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IN THE

Supreme Court of the United States

No. 68-5027

EARNEST JAMES AIKENS, JR., *Petitioner,*

v.

CALIFORNIA, *Respondent.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Supreme Court of California affirming petitioner's conviction of first degree murder and sentence of death by lethal gas is reported at 70 Cal.2d 369, 450 P.2d 258, 74 Cal. Rptr. 882. The oral opinions of the Superior Court of Ventura County finding petitioner guilty and sentencing him to die are unreported, and appear in the trial transcript at Tr. 3372-3419 and 4980-4992.[1]

[1]Respondent has filed a motion, with petitioner's acquiescence, requesting that the Court consider this case upon the original record and dispense with the printing of an Appendix. Petitioner's brief is required to be filed before the motion can be decided. We therefore refer to the documents as paginated in the original record.

JURISDICTION

The jurisdiction of this Court rests upon 28 U.S.C. §1257 (3), the petitioner having asserted below and asserting here a deprivation of rights secured by the Constitution of the United States.

The judgment of the Supreme Court of California was entered on February 18, 1969. Pursuant to Rule 22(1) of this Court, Mr. Justice Douglas extended the time for filing a petition for *certiorari* until May 30, 1969; and the petition was filed on May 29, 1969.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth Amendment to the Constitution of the United States, which provides:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

It involves the Due Process Clause of the Fourteenth Amendment.

It further involves Cal. Penal Code §§ 187, 188, 189, 190, 190.1, 3604 and 3605, which are set forth in Appendix A to this brief [hereafter cited as App. A, pp. ____ *infra*], at App. A, pp. 1a-3a *infra*.[2]

QUESTION PRESENTED

Does the imposition and carrying out of the death penalty in this case constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?

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[2] Following the date of petitioner's conviction and sentence, two provisions of the California murder statutes were amended in particulars not here relevant. The present form of the provisions is also set forth in the same appendix, App. A, pp. 3a-4a, *infra*.

STATEMENT OF THE CASE

Following a bench trial in the Superior Court of Ventura County, petitioner Earnest James Aikens, Jr., was convicted of the first-degree murder of Mrs. Mary Winifred Eaton, on April 26, 1965, and was sentenced to die for that offense. In consolidated proceedings, he was at the same time convicted of the first-degree murder of Mrs. Kathleen Nell Dodd on April 3, 1962, and sentenced to life imprisonment pursuant to Cal. Penal Code §190.1,[3] which prohibits the imposition of the death penalty upon any person who was under the age of eighteen when the murder was committed. Petitioner was not quite seventeen when Mrs. Dodd was murdered, and was twenty at the time of the murder of Mrs. Eaton.

Both of these killings were unmitigated atrocities, committed during robberies and rapes of the victims after the killer had entered their homes. Although not overwhelming, the circumstantial evidence presented by the prosecution was sufficient to identify petitioner as the killer. In the penalty trial that followed his conviction of Mrs. Eaton's murder,[4] the prosecution also showed that petitioner had committed a third first-degree murder on June 7, 1962 and a forcible rape on December 25, 1962. The trial court found that:

> "Earnest Aikens has since the age of eleven years of age, or thereabouts, been involved in an almost continuous pattern of anti-social and criminal behavior of one sort or another. He has graduated from petty and minor nuisances and offenses through more serious proceedings that have involved Juvenile Court wardship and a commitment to Los Prietos Boys' School and to more recent commitments at

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[3] App. A, pp. 2a-3a *infra.*

[4] This Court is familiar with the two-stage procedure provided by California law for the trial of capital cases. See *McGautha v. California,* 402 U.S. 183 (1971).

> the Preston School of Industry and the Youth Training School, both administered by the California Youth Authority. In the instances of his parole from the Authority level, his periods of surcease from criminal behavior have been of short duration. Now he stands convicted of two brutal, cold-blooded and vicious killings, together with the finding that I have here earlier made of his responsibility for a third homicide. Interspersed with the foregoing have been instances of assault, rape and robbery. Such record, at the very least, demonstrated an indifferent, arrogant and obvious disregard for the dignity and value of human life and the rights of others." (Tr. 4987)

The court credited psychiatric findings that petitioner was a sociopath (Tr. 4987-4989); found that he had not benefited from rehabilitative efforts in the past (Tr. 4988, 4991) and was not very likely to benefit from them in the future (Tr. 4988-4989);[5] found that his criminal behavior was not substantially explained or mitigated by his upbringing in a fatherless and economically deprived family (Tr. 4989-4991), but was attributable to his failure to use those opportunities that society had given him for a free education and later for institutional rehabilitation (Tr. 4990-4991); and, in view of his "multiple and aggravated crimes . . . against the victims . . . involved and, indeed, against society in general" (Tr. 4992), concluded that he should be put to death (*ibid*).

Petitioner's crimes were indeed aggravated. Mrs. Eaton was a woman in her sixties, the mother of an acquaintance of petitioner's. While she was home alone in the middle of the day, her house was entered; her money and a sharp knife from her kitchen were taken; she was led to a bedroom; her arms were tied behind her with two belts; and she was then raped and killed by several wounds of the

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[5] Although this last conclusion is expressed in terms of the views of the psychiatrists, it appears that the court was itself of the same view.

knife that plainly establish a deliberate and intentional murder.

Mrs. Dodd was twenty-five years old and five months pregnant when she was killed. Her house was entered in the late evening, while her husband was away and her two young children were sleeping. She ran or was taken from the house to a railroad embankment in the area, where she was raped. She then ran from the embankment, was overtaken in a neighbor's driveway, and was killed by numerous stabs of a knife that had been removed from her kitchen. Money was also removed from Mrs. Dodd's house.

A more detailed statement of the evidence relating to the killings of Mrs. Eaton and Mrs. Dodd is set forth in Appendix B to this brief. We do not place it here because it is lengthy and is not material to our constitutional submission in this Court. Our submission is that the penalty of death is a cruel and unusual punishment for the crime of first-degree murder—or for any other civilian, peacetime crime—no matter how aggravated. We make no claim that if the death penalty can constitutionally be inflicted for any such crime, it cannot be inflicted upon this petitioner.

His were ghastly crimes—as any intentional killing of a human being is a ghastly crime—and were attended by aggravating features that must necessarily arouse the deepest human instincts of loathing and repugnance. But the issue before this Court cannot turn upon those features. This is so because if the state may constitutionally punish petitioner's crimes with death, it may also constitutionally use death to punish murders unattended by the same features. California's statutes and its courts in fact do so; and we can conceive no Eighth Amendment principle which, allowing death punishment in the particular circumstances of this case, could confine it to them. *Cf. Furman v. Georgia,* O.T. 1971, No. 69-5003.

HOW THE CONSTITUTIONAL QUESTION WAS PRESENTED AND DECIDED BELOW

California's automatic appeal statute in death penalty cases (Cal. Penal Code § 1239) imposes upon the California Supreme Court an obligation to consider all legal errors appearing in the record of a capital case. *E.g., People v. Stanworth,* 71 Cal.2d 820, 457 P.2d 889, 80 Cal. Rptr. 49 (1969); *People v. Robinson,* 61 Cal.2d 373, 388 n. 14, 392 P.2d 970, 979 n. 14, 38 Cal. Rptr. 890, 899 n. 14 (1964). Pursuant to that obligation, the Supreme Court here sustained the constitutionality of the death penalty, 70 Cal. 2d at 380, 450 P.2d, at 265, 74 Cal. Rptr., at 889, under authority of *In re Anderson,* 69 Cal.2d 613, 447 P.2d 117, 73 Cal. Rptr. 21 (1968), which had rejected the claim that it was a cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments.

SUMMARY OF ARGUMENT

The penalty of death for first-degree murder is a cruel and unusual punishment because it affronts the basic standards of decency of contemporary society. Those standards are manifested by a number of objective indicators which this Court can properly notice, but principally by the extreme rarity of actual infliction of the death penalty in the United States and the world today. Worldwide and national abandonment of the use of capital punishment during this century has accelerated dramatically, and has now become nearly total.

In historical context, this development marks an overwhelming repudiation of the death penalty as an atavistic barbarism. The penalty remains on the statute books only to be—and because it is—rarely and unusually inflicted. So inflicted, it is not a part of the regular machinery of the state for the control of crime and punishment of criminals. It is an extreme and mindless act of savagery, practiced upon an outcast few. This is exactly the evil against which the Eighth Amendment stands.

If the death penalty is declared unconstitutional, "[t]he State thereby suffers nothing and loses no power. The purpose of punishment is fulfilled, crime is repressed by penalties of just, not tormenting, severity, its repetition is prevented, and hope is given for the reformation of the criminal."[6] In the debates upon the Murder (Abolition of Death Penalty) Bill of 1965, Lord Chancellor Gardiner made the basic point of our argument. "When we abolished the punishment for treason that you should be hanged, and then cut down while still alive, and then disembowelled while still alive, and then quartered, we did not abolish that punishment because we sympathised with traitors, but because we took the view that it was a punishment no longer consistent with our self-respect."[7] Today the death penalty in any form is inconsistent with the self-respect of a civilized people. It is therefore prohibited by the Eighth and Fourteenth Amendments.

ARGUMENT

I. INTRODUCTION

This case presents the question whether the infliction of the penalty of death for the crime of murder, in the form in which the death penalty is administered in California and throughout the United States in this third quarter of the twentieth century, is a cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments. That question is, we think, an open one, uncontrolled by any prior decision of this Court. For while the Court has several times assumed, and expressed in *dicta*, that "the mere extinguishment of life"[8] is not a constitutionally prohibited cruel and unusual punishment, it has never focused squarely

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[6] *Weems v. United States*, 217 U.S. 349, 381 (1910).

[7] 268 HANSARD, PARLIAMENTARY DEBATES (5th series) (Lords, 43d Parl., 1st Sess., 1964-1965), 703 (1965).

[8] *In re Kemmler*, 136 U.S. 436, 447 (1890) (dictum).

upon that issue or given it the consideration warranted by a major question arising under the Bill of Rights, particularly a question upon which hundreds of human lives depend.[9]

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[9] Analysis of this Court's prior decisions relative to capital punishment demonstrates the correctness of the conclusion recently reached by the Court of Appeals for the Fourth Circuit, that "[t]he Court has never held directly that the death penalty is or is not cruel and unusual punishment." *Ralph v. Warden*, 438 F.2d 786, 789 (4th Cir. 1970).

In *Wilkerson v. Utah*, 99 U.S. 130 (1879), no constitutional contention was raised on behalf of the condemned man. *Id.* at 136-137. The issue presented was whether, in the absence of express statutory provision, execution of a death sentence by the method of shooting was legally authorized. The Court held that it was; and assuming what was not questioned by Wilkerson's counsel--that the death sentence itself was permissible--the Court expressed the view that shooting was not a cruel and unusual method of inflicting it. *Id.* at 134-136.

The cruelty of various methods of inflicting capital punishment was also the question sought to be raised in *In re Kemmler*, 136 U.S. 436 (1890) (electrocution); *McElvaine v. Brush*, 142 U.S. 155 (1891) (solitary confinement preceding execution; and *State ex rel. Francis v. Resweber*, 329 U.S. 459 (1947) (second electrocution after first failed for mechanical reasons). The *Kemmler* and *McElvaine* cases were decided upon the express ground that the Eighth Amendment did not restrict the States (136 U.S. at 447-449; 142 U.S. at 158-159), a view that prevailed in this Court well into the twentieth century. *Pervear v. Massachusetts*, 5 Wall. (72 U.S.) 475, 479-480 (1867); *O'Neil v. Vermont*, 144 U.S. 323, 331-332 (1892) (dictum); *Collins v. Johnston*, 237 U.S. 502, 510-511 (1915). Mr. Justice Frankfurter's decisive vote in *Francis* was cast on the same grounds. (329 U.S. at 466, 469-470.) Thus, the Court's expressed approval of the death penalty in the first two cases was *dictum;* in the third, it was non-dispositive; and in all three cases it was directed merely at the mode of execution of a death sentence whose basic constitutionality was neither argued nor attentively considered.

We shall return shortly to the approval of the death penalty in *Trop v. Dulles*, 356 U.S. 86, 99 (1958) (plurality opinion of Chief Justice Warren). See pp. 26-27, *infra*. That too was, of course, *dictum*, since no death sentence was at issue in *Trop*. And the general pronouncement that the petitioner in *Williams v. Oklahoma*, 358 U.S. 576 (1959), was not denied "due process of law or any other constitutional right" (*id.* at 586-587), hardly speaks to the Eighth Amendment, which was

We make this point at the outset for two reasons. It is, of course, important that our Eighth Amendment contention against the death penalty does not ask the Court to "depart from . . . firmly established principle," *Abbate v. United States*, 359 U.S. 187, 195 (1959), or to overturn any "deliberately decided rule of Constitutional law," *Mapp v. Ohio*, 367 U.S. 643, 677 (1961) (Mr. Justice Harlan, dissenting). To the contrary, the way is perfectly clear for the Court to hold that the death penalty is a cruel and unusual punishment consistently with the proper application of principles of *stare decisis* in constitutional adjudication. But the matter goes further than that. In a very practical as well as a jurisprudential sense, the Eighth Amendment question raised requires a judgment of first impression from this Court.

In saying so, we do not naively suggest that the Court's prior opinions treat the constitutionality of capital punishment as debatable. Obviously, the Court has long and firmly supposed its constitutionality; and if the question had been appropriately posed in *Wilkerson*[10] or *Kemmler*,[11] capital punishment plainly would have been sustained. The same may be true as late as *Francis*,[12] or even *Trop*,[13] although it is difficult to speculate what the Court would have concluded if a square presentation of the Eighth Amendment question had directed its attention to the enormous and constitutionally significant changes which the

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not invoked by Williams. *See also Williams v. New York*, 337 U.S. 241 (1949). In summary, no discussion of the constitutionality of capital punishment under the Eighth Amendment has ever been made by this Court under the circumstances of focused responsibility and consideration which entitle constitutional decisions to precedential weight. *See, e.g., Williams v. Florida*, 399 U.S. 78, 90-92 (1970).

[10] *Wilkerson v. Utah*, 99 U.S. 130 (1879), note 9 *supra*.

[11] *In re Kemmler*, 136 U.S. 436 (1890), note 9 *supra*.

[12] *State ex rel. Francis v. Resweber*, 329 U.S. 459 (1947), note 9, *supra*.

[13] *Trop v. Dulles*, 356 U.S. 86 (1958), note 9, *supra*.

institution of capital punishment had already undergone between the late nineteenth century and 1947 or 1958. Still further changes have occurred since 1958; and the issue of the constitutionality of capital punishment today is an altogether different issue than its validity a century ago. Because the Court has not directly confronted the issue during this century, it has not had occasion to consider the constitutional consequences of the century's changes; and it is for this reason that the Eighth Amendment question presented in 1971 must fairly be viewed afresh, unconstrained by assumptions of the death penalty's validity which the Court first made in 1879 and continued to make—without examination—twenty or a dozen years ago.

What has happened, during the century, is an overwhelming, accelerating, nation-wide and world-wide abandonment of death as a punishment for civilian crime.[14] We shall shortly discuss the precise constitutional implications of that evolution;[15] but, upon any view, it is relevant to, and will ultimately be decisive of, the constitutionality of capital punishment under the Eighth Amendment. Capital punishment has largely gone the way of flogging and banishment, progressively excluded by this Nation and by the civilized nations of men from the register of legitimate penal sanctions. Like flogging and banishment, capital punishment is condemned by history and will sooner or later be condemned by this Court under the Constitution. The question is whether that condemnation should come sooner or later. It is whether the evolution of civility that is inexorably rendering the death penalty intolerable has so far advanced as to make the Eighth Amendment take hold upon this doomed deadly institution; or whether the United States—following a period of more than four years since June 2, 1967 without an execution—must now relapse into killing some or all

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[14] See pp. 27-39, *infra*.

[15] See pp. 39-61, *infra*.

of the more than 660 men on its death rows before that evolution reaches the stage at which their killings are established to be unconstitutional.

We put the issue in this way not because we enjoy the presumptuous exercise of predicting history and the future outcome of this Court's decisions but because, inescapably, that *is* the issue. No one can dispute, we believe, either the fact of the evolution we describe or the legal consequence that, at some point in its development, that evolution must call into play the Cruel and Unusual Punishment Clause of the Eighth Amendment. It must, for the same reasons that a similar evolution has brought flogging[16] and banishment[17] under the Eighth Amendment's ban. The questions then arise: What principles should this Court use to determine the course of historical development, and the point upon that course, which mark a progressively repudiated punishment as cruel and unusual for Eighth Amendment purposes? And with regard to capital punishment, has that course been followed and that point been reached?

These questions are not without difficulty because, as has frequently been noted, the Eighth Amendment itself is not without difficulty.[18] The Court's decisions have not undertaken to define in comprehensive terms the concept of "cruel and unusual punishments."[19] Different approaches

[16] *Jackson v. Bishop*, 404 F.2d 571 (8th Cir. 1968).

[17] *Trop v. Dulles*, 356 U.S. 86, 102 (1958) (plurality opinion of Chief Justice Warren); *Dear Wing Jung v. United States*, 312 F.2d 73, 75-76 (9th Cir. 1962).

[18] *Wilkerson v. Utah*, 99 U.S. 130, 135-136 (1879); *In re Kemmler*, 136 U.S. 436, 447 (1890); *Weems v. United States*, 217 U.S. 349, 370, 375 (1910); *Jackson v. Bishop*, 404 F.2d 571, 577 (8th Cir. 1968); *Ralph v. Warden*, 438 F.2d 786, 789 (4th Cir. 1970).

[19] *Weems v. United States*, 217 U.S. 349, 368-369 (1910); *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion of Chief Justice Warren); Note, *The Effectiveness of the Eighth Amendment: An Appraisal of Cruel and Unusual Punishment*, 36 N.Y.U.L. REV. 846 (1961); Note, *Revival of the Eighth Amendment: Development of*

to that concept are available which would bring the death penalty within its prohibition. The approach taken in this brief is narrower than others that have been persuasively argued.[20] Our approach concentrates upon the particular characteristic of capital punishment that it shares with only a very few other punishments, notably flogging and banishment which have already been constitutionally forbidden.

That characteristic is extreme contemporary rarity resulting from a demonstrable historical movement which can only be interpreted fairly as a mounting and today virtually universal repudiation. Today, "[d]eath is the rarest of all punishments for crime."[21] So far has its repudiation advanced that, if the United States were in fact to execute its 660 condemned men in 1971, it would thereby become uncontestably the greatest killer of human beings by judicial process in the world—probably, the killer of more men than all other non-communist nations of the world combined.[22] This observation speaks strongly to the question

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Cruel-Punishment Doctrine by the Supreme Court, 16 STAN. L. R. 996 (1964); Recent Decision, 5 U. RICHMOND L. REV. 392, 3 (1971).

[20]Goldberg & Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773 (1970); Gottlieb, *Testing the Death Penalty*, 34 SO. CALIF. L. REV. 268 (1961); Bedau, *The Courts, The Constitution, and Capital Punishment*, [1968] UTAH L. REV. 201; Comment, *The Death Penalty Cases*, 56 CALIF. L. REV. 126 (1968).

[21]Sellin, *The Inevitable End of Capital Punishment*, in SELLIN, CAPITAL PUNISHMENT (1967) [hereafter cited as SELLIN (1967)] 239.

[22]Virtually no information is available concerning executions in communist countries. Patrick reports an average of 535.3 executions per year between 1958 and 1962 in the 89 countries using the death penalty for which he could obtain data. Patrick, *The Status of Capital Punishment: A World Perspective*, 56 J. CRIM. L., CRIM. & P. SCI. 397, 408 (1965). After subtraction of the 48.6 annual executions that Patrick reports for the United States during this period (*id.* at 404), the remaining 88 countries conducted 486.7 executions annually. They include all of the major death penalty countries of the world except the communist nations and the following: Burma, Haiti, Ind

whether death is a cruel and unusual punishment within the meaning of the Constitution of a Nation which aspires to be one of the world's more enlightened peoples.

But our approach to the Eighth Amendment concentrates primarily upon the evolution of the death penalty in the United States itself. Properly viewed, that evolution has brought this country to a stage at which the relevant constitutional indicators of a cruel and unusual punishment have abundantly matured. America has had its time of "experimentation"[23] with the killing of men; the experiment has led to one inexorable conclusion; and further development can only make more manifest—at a terrible cost—what is already manifest and manifestly fitting as a basis for judicial application of the Constitution. To demonstrate why this is so, we first discuss the nature of the Eighth Amendment's concern against cruel and unusual punishments, and then proceed to test the death penalty in light of that concern.

II. THE RELEVANT EIGHTH AMENDMENT STANDARD

At the heart of the Eighth Amendment[24] lurks an extraordinary dilemma whose resolution is, we think, the key to decision of this case. The dilemma arises from the confrontation of three basic principles.

Iran, Mali, Mexico (29 of whose 32 jurisdictions have legally abolished the death penalty), Nicaragua, Pakistan, Sierra Leone, Sudan and the Republic of Viet Nam. These latter countries would therefore have to account for more than a quarter of the executions in the non-communist world in order to bring the non-communist total, exclusive of the United States, to 660 according to Patrick's figures. And Patrick's figures appear to be unduly high. See note 51, *infra*.

[23] *See Powell v. Texas*, 392 U.S. 514, 536-537 (1968) (plurality opinion of Mr. Justice Marshall); *Williams v. Florida*, 399 U.S. 78, 138 (1970) (separate opinion of Mr. Justice Harlan).

[24] The Cruel and Unusual Punishment Clause of the Eighth Amendment is made applicable to the States through the Due Process Clause of the Fourteenth. *Robinson v. California*, 370 U.S. 660 (1962), so holds; and there can be little doubt that this Bill of Rights guarantee,

First, in the context of American government, the Eighth Amendment's proscription of cruel and unusual punishments forbids the legislative enactment of such punishments as well as the judicial imposition of them. This has always been accepted. *Weems v. United States,* 217 U.S. 349, 366, 378-379, 382 (1910); *Trop v. Dulles,* 356 U.S. 86, 103-104 (1958) (plurality opinion of Chief Justice Warren); *Robinson v. California,* 370 U.S. 660 (1962); and see *Wilkerson v. Utah,* 99 U.S. 130, 133, 136-137 (1879) (dictum); *In re Kemmler,* 136 U.S. 436, 446-447 (1890) (dictum).

Second, the force of the Amendment is not limited to the prohibition of those atrocities that would have turned the stomachs of the Framers in the Eighteenth Century.[25]

whose "basic concept . . . is nothing less than the dignity of man," *Trop v. Dulles,* 356 U.S. 86, 100 (1958) (plurality opinion of Chief Justice Warren), satisfies the most restrictive test for adoption as a measure of due process. Its derivation from times anterior to Magna Carta (see Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning,* 57 CALIF. L. REV. 839, 845-846 (1969)) through the Bill of Rights of 1689 (1 Wm. & Mary, sess. 2, ch. 2, preamble, clause 10) amply establishes that it is a "'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Palko v. Connecticut,* 302 U.S. 319; 325 (1937). The point did not escape Patrick Henry in 1788. "What has distinguished our ancestors?–That they would not admit of tortures, or cruel and barbarous punishment." 3 ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (1863), 447.

For convenience, we shall speak simply of the Eighth Amendment throughout this brief, meaning thereby the Cruel and Unusual Punishment Clause as it measures the liberty protected by the Due Process Clause of the Fourteenth Amendment.

[25]Certainly the Eighth Amendment does bar those atrocities, but they mark only the core of minimum content of its prohibition. This is what was meant in *Wilkerson v. Utah,* 99 U.S. 130, 136 (1879), by the observation that, although the exact extent of the Cruel and Unusual Punishment Clause is difficult of definition, "it is safe to affirm that punishments of torture . . . , and all others in the same line of unnecessary cruelty, are forbidden." *Wilkerson* does not suggest, as the *Weems* dissent seems to imply, that torture is the outer limit of the Amendment. *Weems v. United States,* 217 U.S. 349, 400-401

This conclusion is compelled by both authority and reason. "[I]t is a constitution we are expounding,"[26] and the Constitution "states or ought to state not rules for the passing hour, but principles for an expanding future."[27] Thus, *Trop v. Dulles*, 356 U.S. 86 (1958), outlawed the hoary penalty of banishment with the observations that the scope of the Cruel and Unusual Punishment Clause "is not static," and that the "Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." (*Id.*, at 101 (plurality opinion of Chief Justice Warren).) See also *Robinson v. California*, 370 U.S. 660, 666 (1962) (referring to "the light of contemporary human knowledge"); *Jackson v. Bishop*, 404 F.2d 571, 578-580 (8th Cir. 1968); *Goss v. Bomar*, 337 F.2d 341, 342-343 (6th Cir. 1964) (*dictum*). Such a conception of evolving standards is a constitutional commonplace,[28] and is firmly

(1910) (Mr. Justice White, dissenting). Nor could the Amendment be so limited for the reasons stated convincingly by the majority in *Weems:*

> "... [S]urely [the Framers] ... intended more than to register a fear of the forms of abuse that went out of practice with the Stuarts. Surely, their jealousy of power had a saner justification than that. They were men of action, practical and sagacious, not beset with vain imagining, and it must have come to them that there could be exercises of cruelty by laws other than those which inflicted bodily pain or mutilation.... [I]f we are to attribute an intelligent providence to [the Eighth Amendment's] ... advocates we cannot think that it was intended to prohibit only practices like the Stuarts, or to prevent only an exact repetition of history. We cannot think that the possibility of a coercive cruelty being exercised through other forms of punishment was overlooked." (*Id.* at 372-373.)

[26] *M'Culloch v. Maryland*, 4 Wheat. 316, 407 (1819).

[27] CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921), 83.

[28] E.g., *Brown v. Board of Education*, 347 U.S. 483, 492-493 (1954) ("In approaching this problem, we cannot turn the clock back to 1868 when the [Fourteenth] Amendment was adopted ...."); *Ex parte Wilson*, 114 U.S. 417, 427-428 (1885) ("What punishments shall be considered as infamous [for purposes of the Fifth Amendment's indictment

entrenched in the jurisprudence of the Eighth Amendment in particular. The Cruel and Unusual Punishment Clause

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requirement] may be affected by the changes of public opinion from one age to another.") Reference was made to *Wilson* and to *Mackin v. United States*, 117 U.S. 348, 351 (1886), in *Weems v. United States*, 217 U.S. 349, 378 (1910), which canvassed the subject in this frequently quoted passage:

> "Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, 'designed to approach immortality as nearly as human institutions can approach it.' The future is their care and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality. And this has been recognized. The meaning and vitality of the Constitution have developed against narrow and restrictive construction. There is an example of this in *Cummings v. State of Missouri*, 4 Wall. 277, where the prohibition against *ex post facto* laws was given a more extensive application than what a minority of this court thought had been given in *Calder v. Bull*, 3 Dall. 386. See also *Ex parte Garland*, 4 Wall. 333. The construction of the 14th Amendment is also an example, for it is one of the limitations of the Constitution. In a not unthoughtful opinion Mr. Justice Miller expressed great doubt whether that Amendment would ever be held as being directed against any action of a State which did not discriminate 'against the negroes as a class, or on account of their race.' *Slaughterhouse Cases*, 16 Wall. 36, 81. To what extent the Amendment has expanded beyond that limitation need not be instanced.
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> "There are many illustrations of resistance to narrow constructions of the grants of power to the National Government. One only need be noticed, and we select it because it was made against a power which more than any other is kept present to our minds in visible and effective action. We mean

"may be therefore progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." *Weems v. United States,* 217 U.S. 349, 378 (1910).

To deny this dynamic character to the Eighth Amendment would produce inconceivable results. Appendix C to this brief sets forth some of the punishments legally in force and commonly in use in this country during the period when the Cruel and Unusual Punishment Clause was written and adopted. If 1791 is indeed the constitutional benchmark and if the Constitution does not forbid capital punishment today upon the theory that it was widely allowed by law and practice in 1791, then the Eighth Amendment also does not forbid today—and will never forbid—the stocks and the pillory, public flogging, lashing and whipping on the bare body,[29] branding of cheeks and forehead with a hot

> the power over interstate commerce. This power was deduced from the eleven simple words, 'to regulate commerce with foreign nations and among the several States.' The judgment which established it was pronounced by Chief Justice Marshall (*Gibbons v. Ogden*), and reversed a judgment of Chancellor Kent, justified, as that celebrated jurist supposed, by a legislative practice of fourteen years and fortified by the opinions of men familiar with the discussions which had attended the adoption of the Constitution. Persuaded by such considerations the learned chancellor confidently decided that the Congressional power related to 'external, not to internal, commerce,' and adjudged that under an act of the State of New York, Livingston and Fulton had the exclusive right of using steamboats upon all of the navigable waters of the State. The strength of the reasoning was not underrated. It was supported, it was said, 'by great names, by names which have all the titles to consideration that virtue, intelligence and office can bestow.' The narrow construction, however, did not prevail, and the propriety of the arguments upon which it was based was questioned. It was said, in effect, that they supported a construction which ' would cripple the government and render it unequal to the objects for which it was declared to be instituted, and to which the powers given, as fairly understood, render it competent'. . . ." (*Id.* at 373-375.)

[29]Whipping was not thought to be a particularly serious punishment in the late eighteenth century. "[B]y the first Judiciary Act of the United States, whipping was classed with moderate fines and short

iron, and the slitting, cropping, nailing and cutting off of ears. Further discussion of a "static" theory of the Eighth Amendment seems unnecessary.[30]

Third, in applying the Eighth Amendment to advancing and changing times, the courts are to be guided by the touchstone of "contemporary human knowledge,"[31] "public opinion . . . enlightened by a humane justice,"[32] and "the evolving standards of decency that mark the progress of a maturing society."[33] What other standards, after all, could possibly be used? Surely it was not the purpose of the Eighth Amendment that succeeding generations of judges should mirror in it their own, individual philosophies of the criminal sanction. So, if the obsolete and eldritch customs of 1791 are not to be perpetually controlling, where else may judges look but to enlightened public opinion for conception of the "cruel and unusual punishments" which the Constitution forbids?

And there stands the dilemma. Quite perceptibly, an extreme difficulty must attend any process of constitutional adjudication by which this Court subjects legislation to the

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terms of imprisonment in limiting the criminal jurisdiction of the District Courts to cases 'where no other punishment than whipping, not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is to be inflicted.' Act of September 24, 1789, chap. 20, § 9; 1 Stat. at L., 77." *Ex parte Wilson*, 114 U.S. 417, 427-428 (1885).

[30]The argument has sometimes been advanced that the Eighth Amendment cannot forbid capital punishment consistently with the indictment clause of the Fifth, which speaks of (and, so the argument goes, constitutionalizes) "capital . . . crime." This reasoning, like the static theory of the Eighth Amendment generally, proves too much. For the double jeopardy clause of the constitution also speaks of "jeopardy of life *or limb*." (Emphasis added.)

[31]*Robinson v. California*, 370 U.S. 660, 666 (1962).

[32]*Weems v. United States*, 217 U.S. 349, 378 (1910).

[33]*Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion of Chief Justice Warren).

test of "enlightened public opinion," and adjudges the validity of a legislature's product according to society's "standards of decency." For, both in constitutional contemplation and in fact, it is the legislature, not the Court, which responds to public opinion and immediately reflects the society's standards of decency. If the question asked by the Eighth Amendment really be whether our democratic society can tolerate the existence of any particular penal law that is on the books, the Eighth Amendment's answer will always be that it can—and for the simple reason that the law is on the books of a democratic society.[34] The conclusion therefore seems to be required either that the Eighth Amendment is *not* a judicially enforceable restriction upon legislation;[35] or that the *Weems-Trop* test referring to contemporary public standards of decency is not a usable measure of the Amendment; or else that the question which we have just posed is not the proper question to which the Amendment and the *Weems-Trop* test respond.

As this way of putting the matter suggests, we think that the question—whether the maintenance of a particular harsh penalty on the statute books is consistent with prevailing standards of decency—is the wrong question. We suggest what we think is the right one below. For we cannot believe that the Eighth Amendment is not a restriction upon

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[34]Mr. Justice Story therefore wrote that the Eighth Amendment "would seem to be wholly unnecessary in a free government, since it is scarcely possible that any department of such a government should authorize or justify such atrocious conduct" as the Amendment forbids. 2 STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (4th ed. 1873), 623. This observation has undoubted merit with regard to penal laws that are generally and uniformly enforced, but it is inapplicable to selectively and rarely enforced punishments. Precisely in regard to such "cruel *and unusual* punishments," the Amendment is most necessary.

[35]See *State v. Cannon*, 55 Del. 585, 190 A.2d 514 (1963), sustaining the punishment of whipping in an opinion which effectively denies any judicial review of legislation under the Cruel and Unusual Punishment Clause.

cruel and unusual penal legislation rightly enforceable by this Court. Nor can we believe that the Amendment's prohibition is restricted to live disembowelment and similar long-gone butcheries—nor, on the other hand, that it invokes the unassisted penological impressions of particular Justices. The *Weems-Trop* test *is*, we submit, the proper one. Common standards of decency in our contemporary society *do* set the limits of punishment allowable under the Eighth Amendment. The problem is how those standards are to be ascertained, and with regard to what specific question.

We begin with the specific question. When a man such as Earnest Aikens comes before the Court claiming that the law under which he was sentenced provides for an unconstitutional cruel and unusual punishment, the question is not: will contemporary standards of decency allow the existence of such a general law on the books? The question is, rather: will contemporary standards of decency allow the general application of the law's penalty *in fact*? The distinction which we draw here lies between what public conscience will allow the law to *say* and what it will allow the law to *do*—between what public decency will permit a penal statute to threaten and what it will allow the law to carry out—between what common revulsion will forbid a government to put upon its statute books as the extreme, dire terror of the State (not to be ordinarily, regularly or in other than a few rare cases enforced), and what public revulsion would forbid a government to do to its citizens if the penalty of the law were generally, even-handedly, non-arbitrarily enforced in all of the cases to which it applied.

This last point—regarding general, even-handed, non-arbitrary application—is critical. For in it lies, we think, a large part of the need to have a Cruel and Unusual Punishment Clause in the Constitution, and of the need to have courts enforce it. The government envisaged for this country by the Constitution is a democratic one, and in a democracy there is little reason to fear that penal laws will be placed upon the books which, in their general application,

would affront the public conscience. The real danger concerning cruel and inhuman laws is that they will be enacted in a form such that they can be applied sparsely and spottily to unhappy minorities, whose numbers are so few, whose plight so invisible, and whose persons so unpopular, that society can readily bear to see them suffer torments which would not for a moment be accepted as penalties of general application to the populace.[36]

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[36] A recent detailed analysis of the historical origins of the cruel and unusual punishment clause of the Eighth Amendment demonstrates that the provision of the English Bill of Rights of 1689 from which the Eighth Amendment's language was taken *verbatim* was concerned primarily with the irregular, selective application of harsh (but not intrinsically barbaric) punishments; and that its cardinal aim was to forbid the oppressive exercises of a legally unregulated power to mete out severe punishments arbitrarily. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CAL. L. REV. 839, 845-847, 852-860 (1969). To be sure, Granucci also finds that the American Framers imperfectly understood the English background of the Cruel and Unusual Punishment Clause, and that they were themselves principally concerned with the problem of intrinsically barbaric penalties. But this does not support a conclusion that the Framers meant to wholly alter the meaning of the guarantee which they found in the English traditions, or to reject protections of the citizen long preserved by their English heritage.

The debates in Congress and in the ratifying conventions concerning the Eighth Amendment are set forth in Appendix D to this brief. Discussion of the Cruel and Unusual Punishment Clause was notably brief; and only one or two of those who voted for it spoke. What they said unquestionably sustains the view that they meant to *include* in the guarantee a proscription of inherently barbarous penalties. It does not sustain the view that they meant to jettison other restrictions upon punishment which were encompassed by the language that they took as embodying the basic rights of the citizen evolved through the course of English history. To the contrary, it is apparent that the principal motive force behind inclusion of the Eighth Amendment in the Constitution was the relatively simple and imprecise notion that its guarantees had always been recognized as restrictions upon English government, and that the new national government established by the Constitution and given considerable powers over individuals could not safely be unleashed from the same safeguards.

Herein is found the difference between the judgment which the legislator makes, responding *politically* to public conscience, and the judgment which a court must make under the obligation that the Eighth Amendment imposes upon it to respond *rationally* to public conscience. A legislator may not scruple to put a law on the books (still less, to maintain an old law on the books) whose general, even-handed, non-arbitrary application the public would abhor–precisely because both he and the public know that it will not be enforced generally, even-handedly, non-arbitrarily. But a court cannot sustain such a law under the Eighth Amendment. It cannot do so because both the Amendment itself and our most fundamental principles of due process and equal protection forbid American governments the devices of arbitrariness and irregularity, even as a sop to public conscience.

To put the matter another way, there is nothing in the political process by which public opinion manifests itself in legislated laws that protects the isolated individual from being cruelly treated by the state. Public conscience often will support laws enabling him to be so mistreated, provided that arbitrary selection can be made in such a fashion as to keep his numbers small and the horror of his condition mute.[37] Legislators neither must nor do take account of

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[37]William Forsyth wrote:

> "... When in respect of any class of offenses the difficulty of obtaining convictions is at all general in England, we may hold it as an axiom, that the law requires amendment. Such conduct in juries is the silent protest of the people against its undue severity. This was strongly exemplified in the case of prosecutions for the forgery of bank-notes, when it was a capital felony. It was in vain that the charge was proved. Juries would not condemn men to the gallows for an offense of which the punishment was out of all proportion to the crime; and as they could not mitigate the sentence they brought in verdicts of Not Guilty. The consequence was, that the law was changed; and when secondary punishments were substituted for the penalty of death, a forger had no better chance of an acquittal than any other criminal. Thus it is that the power which juries possess of refusing to put the law in force has, in the words of Lord John Russell, 'been the

such individuals.[38] But it is the precise business of courts to take account of them, and to disallow under the Eighth Amendment the application to them of penalties so harsh that public conscience would be appalled by their less arbitrary application.[39]

We shall develop this theme more fully, in the pages that follow, with regard to the death penalty. But we have said enough, at this point, to enable us to state our major submission on behalf of Earnest Aikens. His sentence of death for the crime of first-degree murder is an unconstitutional

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cause of amending many bad laws which the judges would have administered with professional bigotry, and above all, it has this important and useful consequence, that laws totally repugnant to the feelings of the community for which they are made, can not long prevail in England.'"

FORSYTH, HISTORY OF TRIAL BY JURY (2d ed. 1878), 367-368. However, as this Court recognized in *McGautha v. California*, 402 U.S. 183 (1971) the American Legislative response to "the problem of jury nullification" in capital cases was to substitute discretionary for mandatory capital sentencing provisions. In this way, laws which might be "totally repugnant to the feelings of the community" as applied to the generality of cases could nevertheless be preserved for sporadic application, free of the pressures of either jury nullification or public pressure on the legislature.

[38]See *Ralph v. Warden*, 438 F.2d 786, 792 (4th Cir. 1970):

> "Although the legislature has the responsibility of establishing criminal penalties, subject only to constitutional limitations, popular acceptance or rejection of capital punishment is reflected by the incidence of actual executions. When the death penalty for rape is exacted with the infrequency that the statistics disclose, there is little pressure for amendment. Public awareness diminishes as the frequency of imposing the penalty decreases, and legislative action is not likely to be prompted when the consequences befall only a few prisoners. For purposes of ascertaining evolving standards, the retention of the death penalty for rape in the codes of some states is less significant than its steady fall into disuse and the present moratorium on executions."

[39]A somewhat similar analysis leads Goldberg and Dershowitz to the conclusion that "A penalty . . . should be considered 'unusually' imposed [in the sense of the Eighth Amendment] if it is administered arbitrarily or discriminatorily." Goldberg & Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1790 (1970).

cruel and unusual punishment because it affronts contemporary standards of decency, universally felt, that would condemn the use of death as a penalty for that crime if such a penalty were uniformly, regularly, and even-handedly applied either to all first-degree murderers or to any reasonable proportion of those eligible for the penalty under California law.[40]

We use the term "reasonable proportion" in order to exclude the sort of tolerance which a law may obtain through rare—or, in the constitutional sense, "unusual"[41]—applica-

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[40]In saying this, we do not ignore the aggravating features of Earnest Aikens' own case. Those features are immaterial for present purposes, because under California law Aikens' sentence of death need not, and does not, depend upon them. Cases presenting the same or worse features might result in a life sentence; cases presenting strongly mitigating circumstances might draw down a death verdict. It is meaningless to ask how enlightened public opinion would react to any particular case. The relevant Eighth Amendment touchstone is the judgment of enlightened public opinion upon the use of the penalty prescribed for the crime defined by law.

[41]"Whether the word 'unusual' has any qualitative meaning different from 'cruel' is not clear. On the few occasions this Court has had to consider the meaning of the phrase, precise distinctions between cruelty and unusualness do not seem to have been drawn. See *Weems v. United States,. . . ; O'Neil v. Vermont,. . . ; Wilkerson v. Utah,. . . .* These cases indicate that the Court simply examines the particular punishment involved in light of the basic prohibition against inhuman treatment, without regard to any subtleties of meaning that might be latent in the word 'unusual.' But cf. *In re Kemmler,. . . ; United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson,* 255 U.S. 407, 430 (Brandeis, J., dissenting). If the word 'unusual' is to have any meaning apart from the word 'cruel,' however, the meaning should be the ordinary one, signifying something different from that which is generally done." *Trop v. Dulles,* 356 U.S. 86, 100-101 n. 32 (1958) (plurality opinion of Chief Justice Warren). We think that the constitutional word "unusual" does have some meaning, see note 36, *supra;* and that in determining whether a particular punishment is "unusual" or "different from that which is generally done," it is necessary to look to the actual infliction of the punishment, not its mere statutory authorization. See *Ralph v. Warden,* 438 F.2d 786, 792, (4th Cir. 1970), quoted in note 38, *supra; O'Neil v. Vermont,* 144

tion. We do so for the reasons which we have just stated: that is, because we believe that the Cruel and Unusual Punishment Clause is designed precisely to condemn any penalty so oppressive that it can command public acceptance only by virtue of extremely infrequent and sporadic enforcement. Laws are written to be enforced with practicable generality in the cases to which they apply; and so it is a fair measure of a law's acceptability to imagine its general enforcement. Let us do so with regard to capital punishment for first-degree murder.

Let us take a very modest standard of generality and assume that the United States were to execute 184 first-degree murderers this year. We have chosen that figure—in the absence of any obtainable information concerning the number of first-degree murder convictions annually[42]—because it represents the largest number of murderers executed in the country since reliable counts began to be kept in 1930. During the year 1935, 184 men and women were put to death for murder in the United States.[43] Of course, it is absurd to suppose that as few first-degree murder convictions are returned yearly in the 1970's as in the 1930's; and

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U.S. 323, 337, 338 (1892) (Mr. Justice Field, dissenting). *Cf. Wilkerson v. Utah*, 99 U.S. 130, 135 (1879), which, after recounting Blackstone's enumeration of the methods of execution authorized by English law (*i.e.*, live disembowelment, beheading and quartering), adds: "History confirms the truth of these atrocities, but the commentator states that the humanity of the nation by tacit consent allowed the mitigation of such parts of those judgments as savored of torture or cruelty, and he states that they were seldom strictly carried into effect."

[42]See Appendix F *infra*. And see Bedau, *Volume and Rate of Capital Crimes*, in BEDAU, THE DEATH PENALTY IN AMERICA (Rev. ed. 1967) [hereafter cited as BEDAU], 56-74.

[43]UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, NATIONAL PRISONER STATISTICS, Bulletin No. 45, *Capital Punishment 1930-1968* (August 1969) [hereafter cited as NPS (1968)], p. 7.

even in the 1930's such knowledgeable observers as Warden Lewis E. Lawes of Sing Sing recognized that the death penalty was not being generally enforced.[44] Nonetheless, let us take the 1935 national high-water mark of 184 first-degree murderers as a measure of some generality of enforcement of the death penalty for murder.

Imagine now 184 electrocutions and gassings in the United States in 1971. That is four times the number of human beings executed during any of the past ten years, and exceeds by 50 the total number of executions for the ten-year period.[45] If, in fact, 184 murderers were to be executed in this year 1971, we submit it is palpable that the public conscience of the Nation would be profoundly and fundamentally revolted, and that the death penalty for murder would be abolished forthwith as the atavistic horror that it is. Our detailed reasons for this submission follow. First, we pause for one additional paragraph to make our legal point clear.

We disagree not at all with the reasoning process, but we dispute the factual premise—unexamined then and now demonstrably incorrect—of the *dictum* announced by this Court thirteen years ago in *Trop v. Dulles,* 356 U.S. 86 (1958):

> ". . . Whatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment—and they are forceful—the death penalty has been employed throughout our history, and, *in a day when it is still widely accepted,* it cannot be said to violate the constitutional concept of cruelty." (*Id.* at 99 (plurality opinion of Chief Justice Warren; emphasis added).)

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[44] LAWES, TWENTY THOUSAND YEARS IN SING SING (1932), 306-307, quoted at note 96, *infra.*

[45] See p. 37, *infra.*

We think that it is simply not correct that the death penalty is today "still widely accepted." We speak, for the reasons that we have already stated, not of its acceptance on the pages of the statute books, but of its acceptance in actual usage—and of such acceptance as it does not illegitimately obtain by being irregularly and arbitrarily applied. Far from being "widely accepted", the death penalty today is with rare public unanimity rejected and repudiated. We proceed next to demonstrate this point and to develop its constitutional implications.

III. THE PENALTY OF DEATH

The acceptance which a punishment is given by contemporary society, and its acceptability under that society's prevailing standards of decency, may be measured by objective indicators. In the case of the death penalty today, numerous indicators point in a single direction. Language requires that we state them one by one; but it is their plain convergence that, we think, marks the punishment of death as unacceptable, cruel and unusual.

(1) All informed observers of the death penalty agree in describing a world-wide trend toward its disuse that is nothing short of drastic.[46] This has been a relatively constant long-

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[46]UNITED NATIONS, DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, CAPITAL PUNISHMENT (ST/SOA/SD/9-10) (1968) [hereafter cited as UNITED NATIONS] 81-82, 96-97, UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, Note by the Secretary-General, *Capital Punishment* (E/4947) (February 23, 1971), pp. 3, 10; SELLIN, THE DEATH PENALTY (1959), published as an appendix to AMERICAN LAW INSTITUTE, MODEL PENAL CODE, Tent. Draft No. 9 (May 8, 1959) [hereafter cited as SELLIN (1959)], 4-14; Sellin, *The Inevitable End of Capital Punishment*, in SELLIN, (1967), 239-240; MATTICK, THE UNEXAMINED DEATH (1966) [hereafter cited as MATTICK], 5-6, WEIHOFEN, THE URGE TO PUNISH (1956) [hereafter cited as WEIHOFEN], 163-164; OHIO LEGISLATIVE SERVICE COMMISSION, STAFF RESEARCH REPORT No. 46, CAPITAL PUNISHMENT (1961), 16-30; Barry, *Hanged by the Neck Until . . .*, 2 SYDNEY L. REV. 401, 411 (1958);

term development, despite expectable short-term swings.[47] Whereas Jeremy Bentham wrote in 1831 that "on the part of rulers–general custom–general at least, not to say universal–delivers its testimony in favour of this punishment,"[48] it is now the case that most of the nations of Western Europe and the Western Hemisphere have legally abolished capital punishment as a penalty for civilian crime.[49] The majority of nations in the world retain the death penalty

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Bedau, *Death Sentences in New Jersey 1907-1960*, 19 RUTGERS L. REV. 1, 9-11 (1964); Kuebler, *Punishment by Death*, 2 EDITORIAL RESEARCH REPORTS (No. 3) 527, 527-537 (July 17, 1963); Hartung, *Trends in the Use of Capital Punishment*, 284 ANNALS 8 (1952); Professor Playfair, in *Symposium on Capital Punishment*, 7 N.Y.L. FORUM 247, 262 (1961).

[47] Appendix E to this brief describes the world trend toward abolition of the death penalty during the past two centuries. See also ANCEL, THE DEATH PENALTY IN EUROPEAN COUNTRIES (Counsel of Europe, European Committee on Crime Problems, 1962) [hereafter cited as ANCEL], 8-13; Kahn, *The Death Penalty in South Africa*, 18 TYDSKRIF VIR HEDENDAAGSE ROMEINS-HOLLANDSE REG 108, 115 (1970) [hereafter cited as Kahn]; JOYCE, CAPITAL PUNISHMENT: A WORLD VIEW (1961), 56-193; LAURENCE, A HISTORY OF CAPITAL PUNISHMENT (1932), 1-27.

[48] BENTHAM, TO HIS FELLOW CITIZENS OF FRANCE, ON DEATH PUNISHMENT (1831), 3.

[49] See Appendix E to this brief. See also UNITED NATIONS 9-11, 83-87; Sellin, *The Inevitable End of Capital Punishment*, in SELLIN (1967), 240; ANCEL 13-16; SCOTT, THE HISTORY OF CAPITAL PUNISHMENT (1950), 74-75. Since the last three works were published, capital punishment has been abolished for civilian crimes in the United Kingdom, except for treason and a few essentially obsolete offenses (see note 58, *infra*); in Canada, except for murder of police and corrections officials, treason, and piracy with violence (see note 62, *infra*); in two additional Mexican states, with the result that 29 of Mexico's 32 jurisdictions are now abolitionist (see UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, Note by the Secretary-General, *Capital Punishment* (E/4947) (February 23, 1971), p. 10); and in Austria, even for "exceptional cases" *(ibid.)*.

on the books but use it relatively infrequently.[50] Estimates of the total number of executions in the world today must necessarily remain speculative, but the figure probably does not much exceed the 560 executions estimated to have occurred in London and Middlesex alone each year during the mid-sixteenth century.[51] These figures are assuredly very crude, but in general terms they mark the magnitude

[50]Patrick, whose execution figures appear to be somewhat high (see note 51 *infra*), found that out of 89 countries which made legal provision for the death penalty during the period 1958-1962, there were 36 which executed not a single human being through the five-year period. Patrick, *The Status of Capital Punishment: A World Perspective*, 56 J. CRIM. L., CRIM. & POL. SCI. 397, 409 (1965). See also UNITED NATIONS 96. Patrick reports 13 additional countries which conducted fewer than one execution per year; 24 countries which conducted one to five executions; 10 countries which conducted between fifty and one hundred executions. Patrick, op. cit. supra, at 409. The Republic of South Africa appears to be the known world leader in executions, averaging about one hundred per year. Kahn, 116-118.

[51]The derivation of the average annual figure of 560 for the last decade of the reign of Henry VIII and throughout the reign of Edward VI is set forth in 1 RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750 (1948), 142 n. 20.

As we have indicated in note 22 *supra*, an annual average total of about 535 executions is reported for the period 1958-1962 by Patrick, for the major capital-punishment countries of the world, excluding the communist nations and eleven non-communist nations (some of them relatively populous). Patrick, *The Status of Capital Punishment: A World Perspective*, 56 J. CRIM. L., CRIM. & POL. SCI. 397, 408 (1965). However, there are reasons to believe that this figure is inaccurately large. Where there is overlapping between the numbers of executions reported by Patrick and the presumably more reliable numbers gathered by the United Nations Department of Economic and Social Affairs for the two periods 1956-1960 and 1961-1965, Patrick's figures are consistently higher. See UNITED NATIONS 43-44, 96-97. The two reports may be consistent, of course, if executions peaked strongly in the middle of the 1956-1965 period, but there is no reason to suppose such a peaking. Second, Patrick does not disclose the terms of his inquiries to his correspondents; and it is entirely possible that his reports include executions in political and

of the trend toward *de facto* abolition.[52] So far has this trend progressed that the Secretary-General of the United Nations recently reported to the Economic and Social Council that: "Those countries retaining the death penalty report that in practice it is only exceptionally applied and frequently the persons condemned are later pardoned by executive authority."[53] And, notwithstanding its habitual cautiousness and deference to national sovereignty in domestic matters, the United Nations Economic and Social Council recently adopted a resolution affirming "that the main

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military contexts which should be put out of account for present purposes. Third (a relatively small matter), Patrick's own columnar figures do not total to 535.3, as he says, but to 517.1. Patrick, *op. cit., supra,* at 398-404.

In any event the figures today are almost certainly lower than those for 1962-1963. The United States contributed 48.6 executions per year to Patrick's total, *id.* at 404; and we know that there have been no executions in this country since 1967. Among the nations reporting to the United Nations for both the 1956-1960 and the 1961-1965 periods, there was a sharp decline in executions from the first to the second period (UNITED NATIONS 96-97); a number of nations have abolished capital punishment *de jure* since 1962 (see Appendix E to this brief); and the only country in the world where it is definitively known that executions have been lately on the increase is the Republic of South Africa (Kahn, 116; and compare Van Niekerk, *The Administration of Justice, Law Reform and Jurisprudence,* [1967] ANNUAL SURVEY OF SOUTH AFRICAN LAW 444, 471-472, with Patrick). Projecting the 40% decrease found in the United Nations figures for countries which reported during both of its reporting periods, and assuming that the extent to which American executions have exceeded the 40% rate more than offsets the increase in South Africa, there would be fewer than 200 executions a year today in the countries studied by Patrick. We would have to nearly treble that figure, in consideration of the communist and eleven non-communist countries—surely a generous allowance—in order to bring the world total to 560.

[52]See ANCEL 12: "Abolition in law has in almost all cases been preceded by abolition in practice . . . ."

[53]UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, Note by the Secretary-General, *Capital Punishment* (E/4947) (February 23, 1971), p. 3.

objective to be pursued is that of progressively restricting the number of offences for which capital punishment might be imposed with a view to the desirability of abolishing this punishment in all countries so that the right to life, provided for in Article 3 of the Universal Declaration of Human Rights may be fully guaranteed."[54]

(2) This historical development has not been a mere collection of happenings unanimated by a theme. Capital punishment has not simply atrophied or gone out of fad in the world, but has been progressively rejected in the course of an ideological and moral debate resonant with concerns that are intimately connected with the "principle of civilized treatment" and "the dignity of man." *Trop v. Dulles*, 356 U.S. 86, 99, 100 (1958) (plurality opinion of Chief Justice Warren). Any sampling of the literature of this debate makes manifest that—although there are entirely convincing practical reasons for putting an end to the death penalty—the principal arguments urged to support its abolition have always been humanistic, and concerned with fundamental human decency.[55] We need cite but a few of the most obvious examples.[56]

[54]UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, Resolution 1574(L), *Capital Punishment*, adopted May 20, 1971 (E/RES/1574(L), May 28, 1971).

[55]The arguments for and against capital punishment have been frequently catalogued. See, e.g., FAVREAU, CAPITAL PUNISHMENT: MATERIAL RELATING TO ITS PURPOSE AND VALUE (compiled by Hon. Guy Favreau, Canadian Minister of Justice) (Queen's Printer, Ottawa, 1965) [hereafter cited as FAVREAU], 22-35; Vialet, Capital Punishment: Pro and Con Arguments (United States, Library of Congress, Legislative Reference Service, mimeo, August 3, 1966), reprinted in *Hearings Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 90th Cong., 2d Sess., on S. 1760*, To Abolish the Death Penalty (March 20-21 and July 2, 1968) (G.P.O. 1970) [hereafter cited as *Hearings*], 172-200; UNITED NATIONS 61-64, 115-124; BEDAU 120-231; SELLIN (1967), 3-21, 39-104; 2 NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS (G.P.O. 1970), 1350-1363.

[56]BOK, STAR WORMWOOD (1959); CALVERT, CAPITAL PUNISHMENT IN THE TWENTIETH CENTURY (1927); Camus, *Reflec-*

It is for this reason, of course, that capital punishment, uniquely among secular penal institutions, has become the subject of intense concern by religious groups.[57] For the same reason, the long-enduring struggle for legal abolition has been waged with the fervor of a crusade.[58] The same reason brought Albert Camus to call the abolition of the death penalty "a great civilizing step";[59] it brought former Attorney General Ramsey Clark to call abolition "a major

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tions on the Guillotine, in CAMUS, RESISTANCE, REBELLION AND DEATH (1961), 173 [hereafter cited as CAMUS]; GOWERS, A LIFE FOR A LIFE (1956); KOESTLER, REFLECTIONS ON HANGING (Amer. ed. 1957) [hereafter cited as KOESTLER].

[57]See Bedau, *The Issue of Capital Punishment*, 53 CURRENT HISTORY (No. 312) 82, 84-85 (Aug. 1967); *Hearings* 155-156. The expressions of denominations are set forth in the Appendix to the *Amici Curiae* Brief of the American Friends Service Committee, et. al., in *Witherspoon v. Illinois*, 391 U.S. 510 (1968) (O.T. 1967, No. 1015).

[58]The history of the struggle in England is recounted in 1 RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750 (1948); TUTTLE, THE CRUSADE AGAINST CAPITAL PUNISHMENT IN GREAT BRITAIN (1961); PHILLIPSON, THREE CRIMINAL LAW REFORMERS (1923). Final abolition came in December, 1969, when the House of Commons and the House of Lords respectively agreed to the permanent continuation of the abrogation of capital punishment for murder which had been provided during an experimental five year period by the Murder (Abolition of Death Penalty) Act 1965, [1965] 2 PUBLIC GENERAL ACTS, ch. 71, p. 1577 (Nov. 8, 1965). See 793 HANSARD, PARLIAMENTARY DEBATES (5th series) (Commons, 44th Parl., 4th Sess., 1969-1970), 1294-1298 (December 16, 1969); 306 *id.* Lords, 44th Parl., 4th Sess., 1969-1970), 1317-1322 (December 18, 1969). It is true that capital punishment continues to be provided for treason, piracy with violence, dockyards arson and some military offenses (Professor Radzinowicz, in *Hearings*, at 57), but its execution for these crimes seems unlikely. The American history appears in BYE, CAPITAL PUNISHMENT IN THE UNITED STATES (1919); Bedau, *General Introduction*, in BEDAU 1-32; Filler, *Movements to Abolish the Death Penalty in the United States*, 284 ANNALS 124 (1952). See also BLOCK, AND MAY GOD HAVE MERCY (1962), 83-173.

milestone in the long road up from barbarism;"[60] and it brought the Archbishop of Canterbury to conclude, following the abolition of capital punishment for murder in Great Britain in 1969, that:

> "Abolition of capital punishment, once and for all, will help create a more civilized society in which to continue the search for the causes of crime . . . I am certain it will redound in very many ways to the advantage and honor of the nation."[61]

We set forth these expressions not for the purpose of convincing the Court that Albert Camus, or Ramsey Clark, or Michael Ramsey, is correct, as a moral matter. The point is simply that the terms they use are archetypal reflections of the terms in which the capital punishment controversy has been fought during the years in which world history has progressively, and now quite thoroughly, abandoned the death penalty. Opposition to capital punishment has invariably been asserted on the basis of "fundamental moral and social values in our civilization and in our society."[62] For this reason, the present marked attrition

[60]Statement of Attorney General Ramsey Clark, in *Hearings*, at 91. See CLARK, CRIME IN AMERICA (1970), 336.

[61]*The New York Times*, December 19, 1969, p. 9.

[62]"I have tried to show that in dealing with this issue we should all be concerned—as I see it, primarily concerned—with the protection of society from the crime of murder. But we are also concerned—and this concern has been voiced by many speakers in this debate—with certain fundamental moral and social values in our civilization and in our society." Prime Minister Lester B. Pearson, addressing the House of Commons in support of a bill restricting the death penalty for murder in Canada. CANADA, HOUSE OF COMMONS, IV DEBATES, 27th Parl., 2d Sess. (16 Eliz. II), 4370 (Nov. 16, 1967). Prime Minister Pearson, who favors total abolition, concluded that: "If we cannot yet eliminate capital punishment entirely from the Canadian system of justice, if we have not yet achieved that degree of civilization, then let us at least take the important step toward that time which is now open to every one of us in this house." *Id.* at 4372.

Following the debate in which the Prime Minister spoke, Parliament did adopt the statute, An Act to amend the Criminal Code, 16

of the use of capital punishment throughout the world must be seen as something more than a sort of aimless obsolescence. It can only fairly be seen, in the light of the forceful struggle waged around the penalty of death, as a repudiation.[63]

(3) One further point connected with the ideological history of this repudiation of the death penalty bears emphasis. The values which have been most consistently opposed to capital punishment, and which have largely extirpated it in the western world over the course of the last two centuries, lie very close to the root of the Anglo-American conception of a free and civilized society. Sellin has written that:

> ". . . the struggle about this punishment has been one between ancient and deeply rooted beliefs in retribution, atonement or vengeance on the one hand, and, on the other, beliefs in the personal value and

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Eliz. II, ch. 15, [1967-1968] I ACTS OF CANADA (16 & 17 Eliz. II) 145 (1967), whose effect is to abolish the death penalty for all murders other than murders of police or corrections officers in the course of duty. Like the English abolition act of 1965 (see note 58 *supra*), the Canadian act is effective for a five-year period, and must then be renewed to remain in force. Canada also retains on the books legislation providing capital punishment for treason and for piracy with violence. II REV. STAT. OF CANADA (1970), ch. C-34, §§46-47, 75.

The Canadian debates, like those upon the English abolition bills in 1965 and 1969, demonstrate that the abolitionists generally drew support from those "fundamental moral and social values in our civilization" invoked by Prime Minister Pearson. See CANADA, HOUSE OF COMMONS, IV and V DEBATES, 27th Parl., 2d Sess. (16 Eliz. II), 4077-4891 (1967); 709-716 HANSARD, PARLIAMENTARY DEBATES (5th series) (Commons, 43d Parl., 1st Sess., 1964-1965), [709] 487-[716] 466 (1965); 268 and 269 *id.* (Lords, 43d Parl., 1st Sess., 1964-1965), [268] 455-[269] 554 (1965); 793 *id.* (Commons, 44th Parl., 4th Sess., 1969-1970), 1147-1294 (1969); 306 *id.* (Lords, 44th Parl., 4th Sess., 1969-1970), 1106-1318 (1969).

[63] Bentham accurately foretold the development: "And, as the dissocial affections decrease in strength, and the social increase—in a word, as civilization advances—the reluctance to contribute to the infliction of this punishment will increase . . ." BENTHAM, TO HIS FELLOW CITIZENS OF FRANCE, ON DEATH PUNISHMENT (1831), 5.

dignity of the common man that were born of the democratic movement of the eighteenth century, as well as beliefs in the scientific approach to an understanding of the motive forces of human conduct, which are the result of the growth of the sciences of behavior during the nineteenth and twentieth centuries."[64]

This is not to say, of course, that no one does or can approve the death penalty for other reasons than belief in

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[64]SELLIN (1959) 15. See also ANCEL 9:

> "The abolitionist movement began in the 18th century under the influence of humanitarian philosophy. It is bound up with the establishment of classical penal law, in so far as this endeavours to substitute for vengeance and expiation the notion of rational retribution based on the offence, to distinguish between substantive law and moral law, to punish in the interests of society and to find a coercive and corrective substitute in sentences of imprisonment for the old corporal punishments."

And see PLAYFAIR & SINGTON, THE OFFENDERS (1957), 230:

> "[T]he death penalty belongs historically to a purely punitive penal system, founded on the ecclesiastical notion of the expiation of crime and expressed chiefly in violence of an unspeakably brutal kind. This notion, during the past two hundred years, has been in full retreat everywhere before the advance of humanitarian and scientific influences."

This point is borne out forcefully when one considers the professional identifications of those who have traditionally opposed, or supported, capital punishment:

> "In the first place, it will be noted that, among the leading authorities in penal science, the supporters of abolition appreciably outnumber those who favour the retention of capital punishment. The specialists of the social sciences, criminologists, sociologists, penologists, psychologists, doctors and writers on social science and criminology are, in their great majority, abolitionists. The supporters of capital punishment, apart from a number of political figures and persons holding high public office, are generally jurists with a traditional training and judges."

UNITED NATIONS 64. *Accord: id.* at 124; BEDAU 122-123; and see West, *Medicine and Capital Punishment,* in *Hearings,* at 124; KOESTLER 21-40.

retribution, atonement or vengeance; but it is significant that those beliefs have been historically the mainstays of support for the institution of capital punishment, while the movement for abolition has been spearheaded by concerns derived from conceptions of the worth and dignity of the individual. The ultimate premise and lesson of capital punishment is "'that a man's life ceases to be sacred when it is thought useful to kill him.'"[65] Little wonder that the nations of the world most closely allied with our own in traditions, and sharing our heritage and aspirations of respect for the citizen, have now overwhelmingly rejected the death penalty.[66]

(4) So has the United States. In this country, the decreasing trend of executions has been consistent and dramatic. The National Crime Commission recently noted that:

> "The most salient characteristic of capital punishment is that it is infrequently applied. . . . [A]ll available data indicate that judges, juries and governors are becoming increasingly reluctant to impose or authorize the carrying out of a death sentence." (PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, REPORT (THE CHALLENGE OF CRIME IN A FREE SOCIETY) (1967), 143.)

The extent to which this is true appears upon inspection of the highly reliable figures on executions maintained by the Federal Bureau of Prisons since 1930. Its latest cumulative report shows that 3,859 persons were executed under civil authority in the United States between 1930 and 1968. UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, NATIONAL PRISONER STATISTICS, Bulletin No. 45, *Capital Punishment 1930-1968* (August 1969) [hereafter cited as NPS (1968)], p. 7. Of these 3,859 men and women, only 191 were executed during the decade of

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[65] Francart, quoted in CAMUS 229.

[66] See Appendix E to this brief.

the 1960's, only 25 since the end of 1963 (*ibid.*); and no one has been executed in the United States during more than four years since June 2, 1967. The trend is adequately shown by setting out the figures for the number of executions during each of the following representative years (*ibid.*):

Total Number of Executions in the United States

1930	155	1963	21
1935	199	1964	15
1940	124	1965	7
1945	117	1966	1
1950	82	1967	2
1955	76	1968	0
1960	56	1969	0
1961	42	1970	0
1962	47		

Although forty-one States, the federal government and the District of Columbia authorize the death penalty by law for at least one offense,[67] fourteen of these forty-three jurisdictions have carried out no executions since 1960.[68] Nineteen have carried out no executions since 1961.[69] Twenty-four have carried out no executions since 1962.[70] Thirty

[67] Appendix G to this brief collects the capital sentencing provisions currently in force in the United States. The death penalty is not authorized by law in Alaska, Hawaii, Iowa, Maine, Michigan, Minnesota, Oregon, West Virginia, or Wisconsin. Puerto Rico and the Virgin Islands are also abolitionist. (See Appendix E to this brief, footnote 10e.) Of the forty-three American jurisdictions which allow capital punishment at all, five (New Mexico, New York, North Dakota, Rhode Island and Vermont) restrict it severely.

[68] NPS (1968) 8-9: Connecticut, Delaware, Idaho, Massachusetts, Montana, Nebraska, New Hampshire, New Mexico, North Dakota, Rhode Island, South Dakota, Tennessee, Utah, and the District of Columbia.

[69] NPS (1968) 8-9. States conducting their last executions in 1961 are Indiana, Louisiana, Maryland, Nevada and North Carolina.

[70] NPS (1968) 8-9. States conducting their last executions in 1962 are Illinois, Kentucky, Pennsylvania, South Carolina and Virginia.

have carried out no executions since 1963.[71] Thirty-five have carried out no executions since 1964.[72]

It is interesting to note the regional distribution of the executions. (We shall return later to the racial figures.) Of the 3,859 persons killed since 1930, 33 were executed by the federal government; 608 by nine northeastern States; 403 by twelve north-central States; 509 by thirteen western States; and 2,306 by sixteen southern States and the District of Columbia. (*Id.* at 8-9.) Since 1960, the corresponding figures for 191 executions are as follows: federal–1; northeastern States–17; north-central States–21; western States–48; southern States and D.C.–104. (*Ibid.*) As of December 31, 1968, there were 479 men on death row throughout the entire country. One of these was a federal prisoner; 62 were in the northeastern States; 67 were in the north-central States; 114 were in the western States; and 235 were in the southern States and D.C. (*Id.* at 22-23.)

(5) We summarize our conclusions from the preceding paragraphs as follows: Actual use of the death penalty throughout the world has declined precipitously against the background of a strong ideological controversy in which the increasingly prevailing forces of abolition have staked their case primarily upon the inhumanity and indecency of the penalty. They have prevailed virtually universally–and most notably in countries sharing our western humanist traditions –to the extent that today, the execution of a capital sentence is an almost indescribably uncommon event. Within the United States, it is plainly the most uncommon of all punishments for crime.[73] In this country, executions vary

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[71] NPS (1968) 8-9. States conducting their last executions in 1963 are Arizona, New Jersey, New York, Ohio, Washington and the federal jurisdiction.

[72] NPS (1968) 8-9. States conducting their last executions in 1964 are Arkansas, Florida, Georgia, Mississippi and Texas.

[73] Sellin, *The Inevitable End of Capital Punishment*, in SELLIN (1967), 239.

as a function of geography and are preponderately a southern phenomenon; but, since 1958 at the least, executions in all regions of the United States for any crime have been rare. Since 1963 they have been freakishly rare.

(6) What do these almost incredible rarities in the use of capital punishment imply for the constitutional issue before the Court? In the first place, they obviously imply—in the language of *Trop v. Dulles, supra*—that capital punishment is *not* "still widely accepted" in contemporary America. Recently, this Court cited public opinion polls indicating that about half the American people say they believe in the death penalty. *Witherspoon v. Illinois*, 391 U.S. 510, 519-520 (1968). While it seems to us unthinkable that human life should be taken in the name of an institution that is so equivocally and marginally received—even in theory—as this, we do not rely upon the polls. For the value of such polls[74] is very slight as a gauge of the standards of decency to which the Eighth Amendment bids this Court look.

This is so because opinions tapped in this fashion are notoriously fickle and particularly unreliable after several years without an execution.[75] But it is so primarily because the citizen who deals with a poll-taker—like the legislator who puts or maintains a capital statute on the books—can have his cake and eat it too. He can afford to approve the principle of killing because in practice the persons selected to die will be so few as to go unnoticed. The real measure of American moral attitudes about the death penalty is reflected in what this Nation of 200 million people *does*.[76]

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[74] The poll results are collected in Erskine, *The Polls: Capital Punishment*, 34 PUBLIC OPINION QUARTERLY 290 (1970).

[75] Short-term swings in public opinion respond to the most recently publicized outrageous execution or outrageous crime. "If the last victim happens to arouse pity—a feeble-minded boy for instance, unhinged by the movies, or a mother of two children, half-crazed by gin and jealousy—up go the 'nays' of mercy like a flight of doves; if he is a cool customer like Christie, up go the 'ayes' like a swarm of vultures." KOESTLER 163.

[76] See *Ralph v. Warden*, 438 F.2d 786, 792 (4th Cir. 1970), quoted in note 38 *supra*.

What it has done, in the years 1965-1970 inclusive, is to execute only ten people.

Of course, stays of execution and state and federal post-conviction proceedings on behalf of condemned men affect these figures, but not very much. In May of 1971, there were only 648 men on death row, notwithstanding the near cessation of executions since the end of 1964.[77] And even this figure conveys an inflated image of the number of men destined to be killed.[78] Plainly, the processes of American

[77] *The New York Times*, May 4, 1971, p. 30.

[78] Since 1967, a nation-wide effort has been maintained to obtain stays of execution for all condemned men pending disposition by this Court of the constitutional issue now presented. As a part of that effort, counsel for petitioner Aikens also represent several hundred other condemned men, and are consulting with attorneys who represent a large proportion of the remainder. It is our uniform experience that governors will almost never give consideration to commutation in a capital case while judicial proceedings are pending; and frequently they will not consider commutation so long as there is any reason simply to defer the matter by the granting of a gubernatorial stay. As a result, the years 1967-1971 which have seen a complete cessation of executions have also seen an almost equally complete cessation of commutations. There have been exceptions, of course—most notably Governor Winthrop Rockefeller's commutation of the sentences of all fifteen men on Arkansas' death row in December, 1970, and Governor West's commutation of three death sentences in South Carolina this year—but, for the most part, the processes of commutation have not been functioning during the past four years.

Another effect of the four-year moratorium on executions is more difficult to document, but has impressed informed observers. The *Philadelphia Sunday Bulletin*, May 23, 1971, reports:

> "Jurors are finding it easier to impose the death sentence in murder cases now because they believe it will never be carried out, William J. Stevens, Jr., assistant district attorney in charge of homicides, said yesterday.
>
> "He made the comment after a reporter pointed out that in the last two months juries in Common Pleas courts here have sentenced two defendants to death for first-degree murder, although 'death row' has been abolished.
>
> "Stevens emphasized that Governor Shapp has said no prisoner will be executed while he is in office. Prior to

justice through which the conscience of a people may be glimpsed are sending very, very few men onto death row, and taking most of them off again before execution day. What American acceptance of the death penalty now boils down to is that America can stomach a few legal killings a year.

(7) One may look at these figures from another direction as well. No one knows or can estimate accurately how

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Shapp's inauguration last January, the state had observed an eight-year amnesty on imposition of the death penalty.

Easier to Impose

"'With all the pronouncements against the death penalty,' said Stevens, 'the public's back is up. And when the public is assured by the governor that he will (decree amnesty for) all death sentences, it is easier for a person to impose it.

"'For me personally, it would resolve any residual doubts when I know it's a token gesture anyway.'"

"Stevens said some jurors also are taking a harder line because many prisoners sentenced to life become eligible for parole after 15 years—and the time served is decreasing steadily.

"He said that if life sentences meant prisoners would spend their remaining years in jail, juries would rarely impose a death sentence. He noted that some states allow juries to impose life sentences without parole as an alternative to death sentences."

On the other hand, of course, the death-row population has been somewhat reduced by the effects of this Court's decisions in *United States v. Jackson*, 390 U.S. 570 (1968), and *Witherspoon v. Illinois*, 391 U.S. 510 (1969). But those effects have been minimal insofar as the reported figure of 648 condemned men on May 4, 1971 is concerned. It was not until June 28, 1971 that *Jackson* made any impact upon the death rows of the States (*Funicello v. New Jersey*, ___ U.S. ___, 29 L.ed.2d 859 (1971), and companion decisions); and *Witherspoon* has been largely avoided by most of the lower courts. (Note, *Jury Selection and the Death Penalty: Witherspoon in the Lower Courts*, 37 U. CHI. L. REV. 759 (1970); Supplemental Brief in Support of Petitions for Writs of Certiorari, in *Mathis v. New Jersey*, ___ U.S. ___, 29 L. ed.2d 855 (1971) [O.T. 1970, No. 5006], and companion cases, Appendix).

many convictions of capital crimes are returned in the United States yearly.[79] But we do know that thirty-six States, the District of Columbia, and the federal jurisdictio all retain on their books statutes of general applicability punishing one or more offenses with death. In some State half a dozen or more crimes may be so punishable.[80] Yet with all this capital armament in the arsenal of a Nation o enormous and burgeoning population, with a growing crim rate and a going crime scare, only a few rare men are sentenced to death and fewer executed.[81] This phenomenon reflects, we suggest, an overwhelming national repulsion against actual use of the penalty of death.[82] Such a repul

[79]The problem and the partial figures available to us are discusse in Appendix F to this brief.

[80]Appendix G to this brief sets out the various federal and state criminal statutes providing for the penalty of death.

[81]See CALIFORNIA ASSEMBLY, REPORT OF THE SUBCOMMITTEE OF THE JUDICIARY COMMITTEE ON CAPITAL PUNISHMENT (1957), 27-28, which comments on the California experience as early as 1955, when the phenomenon we are describing was far le marked than it is today:

> ". . . In that year in California 417 non-negligent homicides were reported; 234 persons were charged with murder in the superior courts; 183 were convicted of murder; 52 were convicted of murder in the first degree; 44 were sentenced to life imprisonment; 8 were sentenced to death; an there were 9 executions, presumably most of them for offens committed in previous years. From all this the proper conception of the law would be not as a snare, but as a sieve."

See also McGee, *Capital Punishment as Seen by a Correctional Administrator*, 28 FEDERAL PROBATION (No. 2) 11, 12 (1964).

[82]See Professor Herbert Wechsler, in *Symposium on Capital Punishment*, 7 N.Y.L. FORUM 247, 252-253 (1961):

> "Although the number cannot be determined with precision, no one can doubt that in each of the years involved [1930-1959] with executions ranging from 199 to 48, there were literally thousands of prosecutions that could legally have ended in capital judgment."
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> * * * * *
>
> "The conclusion . . . is inescapable that punishment of death is inflicted in the United States on a bare sample of

sion is all the more striking when one takes into account: (a) that for the past several years the country has undergone one of the most intense of its recurring periods of public agitation about and fear of crime; (b) that for a number of years there have been so few executions as to provide almost no focus for the mobilization of public sentiments against the death penalty;[83] (c) that during these years, and many more before them, American executions have been conducted in secret, their most horrible aspects carefully concealed from public view; (d) that the death penalty is sponsored by the State, publicly approved by State officials,[84] and supported by claims prevalent in law-enforcement quarters[85] (although quite without basis in fact[86]) that the penalty has unique penological values, particularly as a deterrent. It strongly appears, we think, that even under the most favorable conditions for capital punishment—with the vices of the death penalty concealed and its virtues inaccurately extolled—the American conscience has repudiated it hands down.

(8) The concealment, the secrecy, with which we hide away our executions, is doubly significant. First, it gravely inhibits the opportunity for contemporary society to make a

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the culprits whose conduct makes them eligible for its imposition . . . ."

"[T]his experience reveals a deep reluctance in our culture to employ the final sanction . . . ."

See *id.* at 255; Goldberg & Dershowitz, *Declaring the Death Penalty Unconstitutional,* 83 HARV. L. REV. 1773, 1783-1784 (1970); and see *Witherspoon v. Illinois,* 391 U.S. 510, 521 n. 19 (1968).

[83] See BEDAU 22-23.

[84] "The primary support today for the death penalty comes from law enforcement groups, that is, from the police and from prosecutors." BEDAU 120.

[85] J. Edgar Hoover's several releases on the subject of the death penalty are widely publicized examples of these claims. They are reprinted from the F.B.I. Law Enforcement Bulletin and the Uniform Crime Reports in BEDAU 130.

[86] See note 116 *infra.*

clear-sighted and fully informed judgment upon the acceptability of what is really being perpetrated in its name. We assume that—whatever may be the measure of enlightened public opinion—the constitutional standard does not refer to opinion which is kept in the dark by suppression of the relevant facts.[87] Of course, there are perfectly good and humane reasons for forbidding public executions, as every American jurisdiction now does[88]—reasons which (as we shall shortly see) themselves bespeak eloquently the barbarity of capital punishment in any form. But suppression is nonetheless suppression because inspired by good intentions; and, particularly in determining what is a cruel and unusual punishment within the Eighth Amendment, it can hardly be supposed that the conscience-calming effects of suppression are to be discounted on account of their humanity. Nor

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[87] See Goldberg & Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1783 (1970):

> "Were capital punishment . . . better understood, prevailing moral standards might well condemn it. Indeed, it may be that public approval of the death penalty is dependent upon a hiding away of its grim reality."

[88] The first American State to abolish public executions was Pennsylvania, in 1834 (see Filler, *Movements to Abolish the Death Penalty in the United States*, 284 ANNALS 124, 127 (1952), the year in which also Great Britain abolished gibbeting by 4&5 Will. IV, Ch. 26 §§1, 2. Public execution terminated in England in 1868 (see TUTTLE, THE CRUSADE AGAINST CAPITAL PUNISHMENT IN GREAT BRITAIN (1961), 20); and such executions were progressively outlawed in the United States throughout the nineteenth century. BYE, CAPITAL PUNISHMENT IN THE UNITED STATES (1919), 6. The last public execution in the country seems to have occurred in Kentucky in 1936. BARNES & TEETERS, NEW HORIZONS IN CRIMINOLOGY (3d ed. 1959), 307.

Today, California and every other American jurisdiction, by law or practice, strictly and drastically limit the number of witnesses who may attend an execution. See Cal. Penal Code, § 3605, Appendix A, p. 3a *infra*; Hartung, *Trends in the Use of Capital Punishment*, 284 ANNALS 8, 17 (1952); BEDAU 20-23. Even photographing of executions is ordinarily prohibited. See Carter & Smith, *Count Down for Death*, 15 CRIME & DELINQUENCY 77 (1969); BEDAU 22.

can it be supposed that a punishment is entitled to claim acceptability, as a demonstration of its conformance with enlightened standards of decency, *because* it is so repellant that it forces society to look away and not examine it too closely. In Camus' phrase: "The man who enjoys his coffee while reading that justice has been done would spit it out at the least detail."[89] This is not acceptance, but its opposite.

(9) That leads us to our second point concerning the uniform contemporary practice of secret executions: their concealment itself shows their repugnance of present-day

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[89]CAMUS 187. See KOESTLER & ROLPH, HANGED BY THE NECK (1961), 11-12:

> "You could hardly have a nobler example of the true function of words, namely the partial concealment of fundamentals. The phrase 'capital punishment' itself is a less obvious instance—less obvious because we have got so used to it. It means (in England) dislocating a man's neck by tying a six-foot rope around it and suddenly dropping him through a trap door with his arms and legs tied. If his neck happened not to break—it is certain at least to dislocate—then he would strangle, which takes longer and turns his face dark blue. In either case he often defecates, since people usually want to do this when they are frightened, and the huge shock to his nervous system when the rope tightens removes the last vestige of self-control, together with the social need for it.
>
> "This is not a nice picture and few of us care to be reminded of it. Many of us can think calmly enough of capital punishment, because the phrase embodies what *The Times* would call 'a decent reticence.' The reticence has been growing decently for about a century, beginning in 1868 with the decision to hang people in private instead of making it a public spectacle."

(Lest this description be thought wide of the mark in a country which generally no longer uses the gallows, it should be recalled that the Royal Commission in 1953 recommended that England retain hanging as a means of legal execution, because it was more humane and certain than the American methods. ROYAL COMMISSION ON CAPITAL PUNISHMENT 1949-1953, REPORT (H.M.S.O. 1953) [Cmd. 8932] [hereafter cited as ROYAL COMMISSION], 246-261, particularly at 256. Concerning the American methods, see Appendix J to this brief.

standards of decency. Repugnance is the only answer to Justice Bok's trenchant question: "Why is the State so ashamed of its process that it must kill at dead of night, in an isolated place, and on an unnamed day?" BOK, STAR WORMWOOD (1959), 197. Notwithstanding that virtually the only argument still made in the twentieth century to support the death penalty is its supposed efficacy as a general deterrent,[90] the men killed for deterrence's sake today are killed clandestinely, out of public view. Camus' forthright analysis of all that this implies is unavoidable:

> "As an example and for the sake of security, it would be wiser, instead of hiding the execution, to hold up the severed head in front of all who are shaving in the morning.
>
> "Nothing of the sort happens. The State disguises executions and keeps silent about these statements and eyewitness accounts [describing the death scene]. Hence it doesn't believe in the exemplary value of the penalty, except by tradition and because it has never bothered to think about the matter . . . A law is applied without being thought out and the condemned die in the name of a theory in which the executioners do not believe. If they believed in it, this would be obvious to all. But publicity not only arouses sadistic instincts with incalculable repercussions eventually leading to another murder; it also runs the risk of provoking revolt and disgust in the public opinion. It would become harder to execute men one after another, as is done in our country today, if those executions were translated into vivid images in the popular imagination . . . . This is why we must approve of the position of Gambetta, who, as an adversary of the death penalty, voted against a bill involving suppression of publicity for executions, declaring: 'If you suppress the horror of the spectacle, if you execute inside prisons, you will

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[90] We consider the bases of this argument in note 116 *infra* and in Appendix H *infra*.

smother the public outburst of revolt that has taken place of late and you will strengthen the death penalty.'

"Indeed, one must kill publicly or confess that one does not feel authorized to kill. If society justifies the death penalty by the necessity of the example, it must justify itself by making the publicity necessary. It must show the executioner's hands each time and force everyone to look at them—the over-delicate citizens and all those who had any responsibility in bringing the executioner into being. Otherwise, society admits that it kills without knowing what it is saying or doing. Or else it admits that such revolting ceremonies can only excite crime or completely upset opinion."[91]

It should be noted that Camus and others who have made the same point[92] are not indulging in the sort of simplistic argument that is sometimes attributed to them. They are not naive enough to assert, and their point does not rest upon the assertion, that a punishment must be publicly

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[91] CAMUS 186-188.

[92] *E.g.*, LAWES, LIFE AND DEATH IN SING SING (1928), 153-154; Ancel, *The Problem of the Death Penalty*, in SELLIN (1967), 3, 15-16; MENNINGER, THE VITAL BALANCE (1963), 219:

> "We cannot close our chamber of horrors without mention of the epitome of aggression in a civilized society, the imposition of capital punishment, mercifully unseen by the public or by those who order it. While the main argument for the retention of capital punishment is its deterrent effect, it is ironic that it is almost impossible for anyone to be admitted to an execution in order to experience its deterrent effect at close range. This argument would logically demand that executions be open to the public, or at least be broadcast on radio and television like other spectacles. Instead, they are carried out in almost complete secrecy, usually in the middle of the night. This furtiveness suggests some awareness that the social climate has shifted to such a degree that the community at large would not tolerate capital punishment if it could actually see its official representatives taking the lives of inadequate and often obviously disorganized individuals."

exhibited in order to deter. Nor do they deny that there can be degrees of deterrence, and that society may rationally choose the diminished degree that is involved in private infliction of a punishment whose public exhibition would have untoward effects. Allowing the legitimacy of that choice, they ask only what the choice made by our modern society in regard to capital punishment indicates.

Plainly the decision to use capital punishment at all today indicates both the belief that it is a superior deterrent to even life imprisonment, and the desire to maximize the deterrent power of the law in regard to the offenses for which the extreme penalty is prescribed. From a deterrent point of view, the fact "[t]hat capital punishment is horrible and cruel is the reason for its existence."[93] A society which uses a punishment of that sort with the aim of maximizing deterrence can scarcely be expected to depreciate its deterrent force by hiding it—particularly in light of its centuries-old tradition of public executions[94]—unless there is some very strong countervailing force. What then is that force? Can there be any doubt at all that it is the force of decency?

We hide our executions because we are disgusted to look at them, because the view of them would make men sick. We hide them because their public display would render them unacceptable and flout the dignity of man. Could this Court today sustain a *public* execution as consistent with the Eighth Amendment? No consideration that is urged to support closeted executions would be lacking in

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[93] Darrow, *A Comment on Capital Punishment*, in LAURENCE, A HISTORY OF CAPITAL PUNISHMENT (1960), xv, xvii. See CALVERT, CAPITAL PUNISHMENT IN THE TWENTIETH CENTURY (1927), 3:

> "Those who believe in hanging, frankly confess it to be a horrible and revolting practice. They maintain, however, that it is necessary in order to protect society."

[94] TEETERS & HEDBLOM, HANG BY THE NECK (1967), 19-46; BEDAU 2, 20-22. See note 58 *supra*, and the works cited therein.

the case of a public one; and to the condemned man it would make relatively little difference. The one way of killing a human being is not more cruel to him than the other, although it is intolerably more cruel to us. This surely is because

> "if people were to witness the decay of the waiting man, to hear his cries and watch his final struggles, they would be affronted in their consciences, and in their standards of humanity and of human dignity and decency. Our systematic concealment of executions creates a strong inference that capital punishment now falls under our expanded definition of 'cruelty,' particularly when we contrast this present custom of secrecy with the one-time public display of executions."[95]

(10) We have said that secret executions both demonstrate the general unacceptability of killing as a penalty for crime in contemporary America and provide the necessary basis for such slight and uninformed acceptance as it has. The same is true of the rarity of executions. We have already discussed the first of these two aspects of the virtual cessation of American executions during the past several decades (pp. 39-43, *supra*); and we return now to the second.

Almost forty years ago, Warden Lawes made the point that the maintenance of capital legislation on the statute books depends upon its unenforcement.[96] It is, of course, a matter of history, recognized by this Court in *McGautha v. California*, 402 U.S. 183 (1971), that public acceptabi-

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[95]Gottlieb, *Capital Punishment*, 15 CRIME & DELINQUENCY 1, 6 (1969).

[96]LAWES, TWENTY THOUSAND YEARS IN SING SING (1932), 306-307:

> "'What would be the attitude of the American people if by good or ill circumstance the ten thousand men and women who in any one year commit our murders and manslaughters in these United States, would all be convicted of murder, sentenced to death, and that punishment actually inflicted?' What, indeed, but an almost universal cry for abolition?"

lity of the death penalty in this country in this century has been secured only by replacing mandatory capital penalties with statutes allowing jury and court discretion in capital sentencing.[97] These statutes, combined with the prosecutorial discretion at the outset of a capital case and the executive's commutative power at the end of it, allow a "small and capricious selection of offenders [to be] . . . put to death."[98] "Public awareness diminishes as the frequency of imposing the penalty decreases, and legislative action is not likely to be prompted when the consequences befall only a few prisoners." *Ralph v. Warden*, 438 F.2d 786, 792 (4th Cir. 1970).

(11) It is important also to note the identity of the prisoners upon whom the consequences fall. *Whose* killings today does society accept, when it accepts any? Former Governor Michael DiSalle of Ohio has answered this question.

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[97] There are very few crimes in the United States today which carry a mandatory death penalty, and those few are for the most part of the obscure sort under which no one is ever charged (treason, in several States; perjury in a capital case, etc.) See BEDAU 48-52. And see Hartung, *Trends in the Use of Capital Punishment*, 284 ANNALS 8 (1952); Knowlton, *Problems of Jury Discretion in Capital Cases*, 101 U. PA. L. REV. 1099 (1953). Outside the United States, also, mandatory capital punishment is rapidly being replaced by grants of discretion. UNITED NATIONS 13, 82, 87.

[98] Statement of Attorney General Ramsey Clark, in *Hearings*, at 93:

> "A small and capricious selection of offenders have been put to death. Most persons convicted of the same crimes have been imprisoned only. Experienced wardens know many prisoners serving life or less whose crimes were equally, or more atrocious, than those of the men on death row."

Accord: LAWES, TWENTY THOUSAND YEARS IN SING SING (1932), 302, 307-310; DUFFY & HIRSHBERG, 88 MEN AND 2 WOMEN (1962), 254-255; Testimony of Clinton J. Duffy, in *Hearings*, at 24-25; De Ment, *A Plea for the Condemned*, 29 ALA. LAWYER 440, 440-441 n. 2 (1968) (quoting A. Frank Lee, Commissioner, Alabama Board of Corrections). And see BEDAU 410-411.

> ". . . Generally they have one thing in common, they are penniless, of low mental capacity, with little or no education, and have few friends. The fact that they have no money is of particular import in their being condemned to death . . . . It is the poor, the illiterate, the underprivileged, the member of the minority group, who is usually sacrificed by society's lack of concern."[99]

The same point has been made repeatedly by knowledgeable observers. Those who are selected to die are the poor and powerless, personally ugly and socially unacceptable.[100] In disproportionate percentages, they are also black. Racial discrimination is strongly suggested by the national execu-

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[99] DiSalle, *Trends in the Abolition of Capital Punishment*, 1 U. TOLEDO L. REV. 1, 12-13 (1969). See also DiSalle, *Comments on Capital Punishment and Clemency*, 25 OHIO ST. L.J. 71, 72 (1964); and Governor DiSalle's testimony, in *Hearings*, at 11-12.

[100] "It is the poor, the sick, the ignorant, the powerless and the hated who are executed." CLARK, CRIME IN AMERICA (1970), 335. See DUFFY & HIRSHBERG, 88 MEN AND 2 WOMEN (1962), 256-257; LAWES, TWENTY THOUSAND YEARS IN SING SING (1932), 302; LAWES, LIFE AND DEATH IN SING SING (1928), 155; WEIHOFEN 164-165; West, *Medicine and Capital Punishment*, in *Hearings*, at 124, 125; McGee, *Capital Punishment as Seen by a Correctional Administrator*, 28 FED. PROBATION (No. 2), 11, 12 (1964).

The characteristics of the inmates of death row are described in Bedau, *Death Sentences in New Jersey 1907-1960*, 19 RUTGERS L. REV. 1 (1964); Bedau, *Capital Punishment in Oregon, 1903-1964*, 45 ORE. L. REV. 1 (1965); Carter & Smith, *The Death Penalty in California:* A Statistical and Composite Portrait, 15 CRIME & DELINQUENCY 62 (1969); Johnson, *Selective Factors in Capital Punishment*, 36 SOCIAL FORCES 165 (1957); Koeninger, *Capital Punishment in Texas, 1924-1968*, 15 CRIME & DELINQUENCY 132 (1969). And see Brief for the N.A.A.C.P. Legal Defense and Educational Fund, Inc., and the National Office for the Rights of the Indigent, as *Amici Curiae*, in *Boykin v. Alabama*, 395 U.S. 238 (1969) [O.T. 1968, No. 642], p. 7 n. 8.

A discussion of the selective forces that operate at the penalty-trial stage of California capital cases is found in Note, *A Study of the California Penalty Jury in First-Degree-Murder Cases*, 21 STAN. L. REV. 1297 (1969).

tion figures;[101] it has been borne out in a number of discrete and limited but carefully done studies;[102] and it has seemed apparent to responsible commissions and individuals studying the administration of the death penalty in this country.[103] Assuredly, the proof of discrimination is

[101] The following are the total number of persons executed between 1930 and 1967 (3,859), broken down by offense and race, as they appear in NPS (1968), p. 7:

	Murder	Rape	Other	Total
White	1664 (49.9%)	48 (10.5%)	39 (55.7%)	1751 (45.4%)
Negro	1630 (48.9%)	405 (89.1%)	31 (44.3%)	2066 (53.5%)
Other	40 (1.2%)	2 (0.4%)	0 (0.0%)	42 (1.1%)
	3334 (100%)	455 (100%)	70 (100%)	3859 (100%)

[102] Johnson, *The Negro and Crime*, 217 ANNALS 93 (1941); Garfinkel, *Research Note on Inter- and Intra-Racial Homicides*, 27 SOCIAL FORCES 369 (1949); Johnson, *Selective Factors in Capital Punishment*, 36 SOCIAL FORCES 165 (1957); Wolfgang, Kelly & Nolde, *Comparison of the Executed and the Commuted Among Admissions to Death Row*, 53 J. CRIM. L., CRIM. & POL. SCI. 301 (1962); Bedau, *Death Sentences in New Jersey 1907-1960*, 19 RUTGERS L. REV. 1, 18-21, 52-53 (1964). The Stanford Law Review Note cited in note 100 *supra* does not find racial discrimination by California juries at the penalty stage of jury-tried cases. Whether discrimination affects earlier or later stages in the process of selecting the men condemned to die is not revealed in the existing literature. Whether by reason of race or of economic and social factors correlated with race, whites committed to death row in the United States have traditionally escaped the actual infliction of the death penalty in significantly greater proportions than Negroes. See the studies cited *supra;* MANGUM, THE LEGAL STATUS OF THE NEGRO (1940), 369-370; and see McCafferty, *The Death Sentence, 1960*, in BEDAU 90, 95-96.

[103] PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, REPORT (THE CHALLENGE OF CRIME IN A FREE SOCIETY) (1967) 143; PENNSYLVANIA, JOINT LEGISLATIVE COMMITTEE ON CAPITAL PUNISHMENT, REPORT (1961) 14-15; UNITED NATIONS 32, 98; BEDAU 411-413; CLARK, CRIME IN AMERICA (1970), 335; MATTICK 5, 17; WOLFGANG & COHEN, CRIME AND RACE: CONCEPTIONS AND MISCONCEPTIONS (1970), 77, 80-81, 85-86; Hartung, *Trends in the Use of Capital Punishment*, 284 ANNALS 8, 14-17 (1952); Bedau, *A Social Philosopher Looks at the Death Penalty*, 123 AM. J. PSYCHIATRY

stronger in rape than in murder cases;[104] and, in any case, an irrefutable statistical showing that a particular State has violated the Equal Protection of the Laws by consistent racial inequality in the administration of the death penalty is difficult to establish.[105] This is so principally because the total number of death sentences is so exceedingly small in comparison to the number of factors which prosecuting officials, sentencing judges and juries, correctional officials and physicians, and commutative authorities may consider in the exercise of the many selective judgments which finally determine who shall live or die.

Where the occurrence of any phenomenon is rare and the factors that may cause it to occur are unlimited, neither statistics nor any other analytical tool can provide a surefire test for the detection of racial bias among those factors. Thus, a State can discriminate racially and not get caught at it if it kills men only sporadically, not too often, by being arbitrary in selecting the victims of discrimination. Or, to put the matter another way, if a State invokes a particular penalty sufficiently rarely so that no regular pattern of its use develops, the State *may* be acting discriminatorily; it *likely will* be acting in a fashion such that the penalty falls most harshly on the poor and disadvantaged; but it *surely will* be acting in a way that escapes the safeguards of the Constitution, unless the Eighth Amendment forbids. Equal Protection and Due Process provide no judicially usable devices to protect the individual from the arbitrariness of the freakishly rare, harsh penalty.[106] This is all the more

1361, 1362 (1967); and see Rubin, *Disparity and Equality of Sentences–A Constitutional Challenge*, 40 F.R.D. 55, 66-68 (1967).

[104] See Brief for Petitioner, *Jackson v. Georgia*, O.T. 1971, No. 69-5030.

[105] See *Maxwell v. Bishop*, 398 F.2d 138 (8th Cir. 1968), *vacated on other grounds*, 398 U.S. 262 (1970).

[106] It has elsewhere been argued unsuccessfully that they do. *McGautha v. California*, 402 U.S. 183 (1971); *Maxwell v. Bishop*, 398 F.2d 138 (8th Cir. 1968), *vacated on other grounds*, 398 U.S. 262 (1970).

reason, we believe, for application of the constitutional guarantee against cruel and unusual punishments.

(12) But there are other consequences, as well, of the freakishly rare use of a harsh criminal penalty. We have pointed out above that such use escapes not only meaningful control under the constitutional guarantees of Equal Protection and Due Process; it escapes also the fair scrutiny of public conscience, with its attendant pressure to keep the legislature acting decently. A public can easily bear the rare, random occurrence of a punishment which, if applied regularly, would make the common gorge rise. It seems to us that this is just the kind of penalty at which a prohibition of cruel and unusual punishments must aim. Whether it happen by accident or design that penalties of this sort fall most furiously upon the poor and friendless and upon racial minorities, the supposed "acceptance" of the penalty is nonetheless a product of the outcast nature of those who bear the brunt of it. As rarely as we tolerate the infliction of the death penalty today, we still more rarely tolerate its infliction upon *us*.

That the death penalty is rare and unusual permits public and political acceptance of its cruelty, but, for that very reason, requires judicial condemnation under the Eighth Amendment. Rare and uneven usage which evades the public conscience politically demands the supervision by the public conscience, speaking through the courts, which the Eighth Amendment promises. This is the more true because, we think such usage itself affronts "the dignity of man," *Trop v. Dulles, supra,* and those cherished principles of fair and regular, nonarbitrary treatment of the citizen which the Eighth Amendment, no less than the Fourteenth, supposes.

> "[T]he issue . . . is not . . . whether it is fair or just that one who takes another person's life should lose his own. Whatever you think about that proposition it is clear that we do not and cannot act upon it generally in the administration of the penal law. The problem rather is whether a small and

highly random sample of people who commit murder or other comparably serious offenses ought to be despatched, while most of those convicted of such crimes are dealt with by imprisonment."[107]

(13) The reasons why our society is no longer willing generally to act upon the penal principle of a life for a life are, in part, pragmatic. The primary pragmatic consideration of this sort is, of course, our modern development of large-scale penal and correctional institutions which we must maintain whether or not we use them for "capital" criminals, and into which we can now also place our "capital" criminals if we choose.[108] But it is not the mere availability of

[107] Professor Wechsler, in *Symposium on Capital Punishment*, 7 N.Y.L. FORUM 247, 255 (1961). See also Sellin, *The Inevitable End of Capital Punishment*, in SELLIN (1967), 239, 243: "[I]f we conservatively assume that there are now about 2500 capital murders annually in the United States and but seven executions, it is obvious that a life for a life is rarely taken."

[108] See Bedau, *The Courts, The Constitution, and Capital Punishment*, [1968] UTAH L. REV. 201, 232:

> "In 1790, when the eighth amendment was adopted (and even more so in earlier centuries, when 'cruel and unusual punishments' were first prohibited in England) only two types of punishment were available to cope with serious offenses: death (with or without aggravations) and banishment, or 'transportation,' to the colonies or some other remote and relatively uninhabited region. Imprisonment, as something more than a mode of temporary detention prior to trial or as punishment for a minor offense, was entirely unknown at the time anywhere in Europe or America. How could anyone in 1790 sensibly have demanded that the 'evolving standards of decency' required there and then imprisonment rather than death for felons? There were no prisons, no trained custodial and administrative officers, no parole system, no statutes to authorize creating any of these, no public disposition to obtain them—in short, none of the attitudes, facilities and personnel obviously necessary to run a system of long term incarceration. Today, of course, banishment is no alternative at all. Instead, imprisonment is an entirely commonplace practice and a viable alternative to banishment and death for every serious crime. However inhumane and brutal imprisonment may be (and there is no doubt that in practice it often is), involuntary incarceration under close

this alternative to the penalty of death that has made our society choose overwhelmingly to use it and to reject capital punishment. It is the profound appreciation that, once we have developed an alternative,[109] it would be intolerably cruel not to use it.[110]

We have focused our argument in this brief upon the word "unusual" in the Eighth Amendment rather than upon the word "cruel." That is because, as we read this Court's prior decisions,[111] they have not denied the cruelty of the death penalty, but have assumed its constitutionality as not "unusual." Plainly, the death penalty is cruel. Even if it involved no more than the calculated and deliberate extermination of a human life it would be cruel. "The killing of a helpless captive is a brutally degrading experience. If those alone who have participated in an execution could

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supervision may still be a *necessary* 'cruelty' in most cases involving the commission of violent crimes. The undeniably greater severity of death as a punishment over imprisonment is, *ceteris paribus*, sufficient by itself to establish its greater cruelty."

[109] In note 116 *infra*, we discuss very briefly the consideration that are relevant to a rational choice between the alternatives of death and imprisonment as penalties for violent crimes. That discussion is immaterial here, because we could not possibly assert that the considerations canvassed in note 116 control the decisions of prosecutors, juries, judges, governors and others which, in fact, determine use of one penalty or the other. Our point here is simply the descriptive one that each of these decisions today is made with the knowledge that prison is an available alternative, in the sense that it is there if the decider should decide to use it.

[110] See CLARK, CRIME IN AMERICA (1970), 336-337:

> ". . . There were times when self-preservation may have necessitated [the] . . . imposition [of the death penalty]. Later, when food, clothing and shelter were scarce and often insufficient, inordinate sacrifices by the innocent would have been required to isolate dangerous persons from the public. Our civilization has no such excuse."

[111] See note 9 *supra*.

vote on the death penalty, it would be abolished tomorrow."[112] But more is involved. Uniquely among punishments, a death sentence inflicts upon the condemned man "a fate of ever-increasing fear and distress."[113] [114] "The devastat-

[112] West, *Medicine and Capital Punishment*, in *Hearings*, at 125. As previously in briefing the Eighth Amendment question in this Court, the problem of presenting the reality of a punishment of death has given us great trouble. In the Brief for the N.A.A.C.P. Legal Defense and Educational Fund, Inc., and the National Office for the Rights of the Indigent, as *Amici Curiae*, in *Boykin v. Alabama*, 395 U.S. 238 (1969) [O.T. 1968, No. 642], pp. 29-30, we explained why we there decided against providing the Court with published descriptions of the commonly used American methods of execution: "[A]s we prepared the materials for the appendix, we realized that their inclusion here would certainly cause us to be charged with sensationalism and an appeal to passion and repulsion. Such is the character of this institution of killing men that it forces one who attacks it legally either to describe with particularity what he is attacking, and be bitterly resented, or to keep silent about it, and risk being misunderstood. Finally, we have decided to join in the general "decent reticence," and to do no more than provide the Court with citations to descriptions of the methods of executions."

In the present case, we have decided the matter the other way, after much reflection in light of our different responsibilities here. Appendix I to this brief sets forth some of the accurate and responsible descriptions of executions by electricity and hydrocyanic gas.

[113] *Trop v. Dulles*, 356 U.S. 86, 102 (1958) (plurality opinion of Chief Justice Warren). See *Weems v. United States*, 217 U.S. 349, 372 (1910): "[I]t must have come to [the Framers of the Eighth Amendment] . . . that there could be exercises of cruelty by laws other than those which inflicted bodily pain or mutilation."

[114] Dostoevsky, who was himself condemned to die and reprieved only shortly before his scheduled execution, gives this description:

> "But the chief and the worst pain may not be in the bodily suffering but in one's knowing for certain that in an hour, and then in ten minutes, and then in half a minute, and then now, at the very moment, the soul will leave the body and that one will cease to be a man and that that's bound to happen; the worst part of it is that it's *certain*. When you lay your head down under the knife and hear the knife slide over your head, that quarter of a second is the most terrible of all." DOSTOEVSKY, THE IDIOT (Modern Library, 1935), 20 (original emphasis).

ing, degrading fear that is imposed on the condemned for months or years is a punishment more terrible than death . . . ."[115]

(14) It is important, finally, that such rare and unusual use as American society makes of the death penalty today deprives it of any functional place in the rational scheme of a state's penal law. Harsh punishments used in this manner cease to be instruments of public justice or of reasoned penal policy, and hence cease to have any claim to legitimacy that might be set off against the commands of the Eighth Amendment. Capital punishment generally can be shown to have no particular efficacy, in achieving the legitimate aims of the criminal law, that less harsh penalties do not have.[116] But whatever claims of penological efficacy

[115]CAMUS 200. See also *id.* at 199:

> "[In considering the argument from *lex talionis*] let us leave aside the fact that the law of retaliation is inapplicable and that it would seem just as excessive to punish the incindiary by setting fire to his house as it would be insufficient to punish the thief by deducting from his bank account a sum equal to his theft. Let us admit that it is just and necessary to compensate for the murder of the victim by the death of the murderer. But beheading is not simply death. It is just as different, in essence, from the privation of life, as a concentration camp is from prison. It is a murder, to be sure, and one that arithmetically pays for the murder committed. But it adds to death a rule, a public premeditation known to the future victim, an organization, in short, which is itself a source of moral sufferings more terrible than death. Hence there is no equivalence. Many laws consider a premeditated crime more serious than a crime of pure violence. But what then is capital punishment but the most premeditated of murders, to which no criminal's deed, however calculated it may be, can be compared? For there to be an equivalence, the death penalty would have to punish a criminal who had warned his victim of the date at which he would inflict a horrible death on him and who, from that moment onward, had confined him at his mercy for months. Such a monster is not encountered in private life."

[116]The aims of the criminal law are generally stated to be (1) retribution, (2) moral reinforcement or reprobation, (3) isolation, reformation, rehabilitation of the offender, and (4) deterrence. To these may be added: (5) the achievement of the first four aims efficiently and economically.

might be made for the death penalty if it were generally, regularly, fairly and even-handedly applied as a punishment

(1) Although "[m]odern penological thought discounts retribution in the sense of vengeance" [ROYAL COMMISSION 17), nothing in our submission requires the Court to consider whether the States can constitutionally pursue that aim. *Cf. Powell v. Texas*, 392 U.S. 514, 530 (1968). This is so for two reasons. First, the death penalty as it is used today—to kill an arbitrarily selected handful of America's thousands of convicted murderers—is not even supportable by the rationale of retribution. See note 107 *supra*, and accompanying text. "Experienced wardens know many prisoners serving life or less whose crimes were equally, or more atrocious, than those of the men on death row." Statement of Attorney General Ramsey Clark, in *Hearings*, at 93. See LAWES, TWENTY THOUSAND YEARS IN SING SING (1932), 302, 307-310; DUFFY & HIRSHBERG, 88 MEN AND 2 WOMEN (1962), 254-255; Testimony of Clinton T. Duffy, in *Hearings*, at 24. Second, no assessment of the *degree* of punishment necessary to effect retribution can be rationally made. Therefore, it cannot be asserted that any particular penalty is more supportable by retributive purposes than any other.

(2) Moral reinforcement or reprobation doubtless requires that the most serious crimes be punished most seriously. But, obviously, "Grading punishments according to the severity of the crime does not require that the upper limit of severity be the death penalty." BEDAU 268. The reprobation function, therefore, hardly needs or warrants capital punishment. See Ancel, *The Problem of the Death Penalty*, in SELLIN, CAPITAL PUNISHMENT (1967) 3, 16-17, 19.

(3) "[R]eformation . . . can have no application where the death penalty is exacted." ROYAL COMMISSION 18. As for isolation, the evidence is clear and overwhelming that, for no class of criminals, is death required to render them socially safe. Lesser alternatives are ample. SELLIN (1959) 69-79; KOESTLER 144-152; BEDAU 395-405; Bedau, *Death Sentences in New Jersey 1907-1960*, 19 Rutgers L. Rev. 1, 47 (1964).

(4) As for deterrence, there is simply no evidence—despite the most exhaustive inquiry into the subject—that the death penalty is a superior deterrent to lesser punishments. We discuss the evidence in Appendix H to this brief; and see SELLIN (1959), 19-63; SELLIN (1967), 135-186, 244-253; MATTICK 8028; KOESTLER 48-61, 171-178; CALVERT, CAPITAL PUNISHMENT IN THE TWENTIETH CENTURY (3d ed. 1928), 51-90; BEDAU 214, 258-343; Bedau, *A Social Philosopher Looks at the Death Penalty*, 123 AM. J. PSYCHIATRY 1361, 1362 (1967); Hook, *The Death Sentence*, in BEDAU 146,

for crime, surely vanish when it is applied as the United States now applies it—rarely, irregularly, unfairly and un-

147-148, 151. A few law enforcement officials and other who support the death penalty sometimes appear to argue that this proposition is factually debatable. It is not, as more candid proponents of capital punishment admit. "It is generally agreed between the retentionists and abolitionlists, whatever their opinions about the validity of comparative studies of deterrence, that the data which now exist show no correlation between the existence of capital punishment and lower rates of capital crime." UNITED NATIONS 123. Every serious inquiry into the death penalty has accepted this conclusion. UNITED NATIONS 55-58, 115-119; ROYAL COMMISSION 18-24, 58-59, 328-380; CEYLON, SESSIONAL PAPER XIV-1959, REPORT OF THE COMMISSION OF INQUIRY ON CAPITAL PUNISHMENT (1959), 42-52; PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, REPORT (THE CHALLENGE OF CRIME IN A FREE SOCIETY) (1967), 143; CALIFORNIA ASSEMBLY, REPORT OF THE SUBCOMMITTEE OF THE JUDICIARY COMMITTEE ON CAPITAL PUNISHMENT (1957), 27-30; NEW YORK STATE, TEMPORARY COMMISSION ON REVISION OF THE PENAL LAW AND CRIMINAL CODE, SPECIAL REPORT ON CAPITAL PUNISHMENT (1965), 2; PENNSYLVANIA JOINT LEGISLATIVE COMMITTEE ON CAPITAL PUNISHMENT, REPORT (1961), 9, 20-29; FAVREAU 36-37; and see the debates collected in SELLIN (1967), 55-104, and in FAVEREAU, *passim*.

Significantly, wherever serious official inquiries have found some support for the thesis that capital punishment may have greater deterrent efficacy than imprisonment, that support has been found in the impressionistic opinions of police, prosecutors and other law enforcement officials, unsustained by objective evidence. See CANADA, JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS ON CAPITAL PUNISHMENT, REPORT (1956), paras. 29-33, 43-50; NEW JERSEY, COMMISSION TO STUDY CAPITAL PUNISHMENT, REPORT (1964), 8-10; FAVREAU 4, 23. The Royal Commission also gave some weight to such impressionistic opinions, while explicitly recognizing that there was no objective evidence behind them. ROYAL COMMISSION 18-24. Interestingly, corrections personnel appear very preponderately to believe that capital punishment has no particular deterrent efficacy. DUFFY & HIRSHBERG, 88 MEN AND 2 WOMEN (1962), 257; Testimony of Clinton T. Duffy, in *Hearings* 22-23; Thomas, *Attitudes of Wardens Toward the Death Penalty*, in BEDAU 242. And see National Council on Crime & Delinquency, Board of Trustees, *Policy Statement on Capital Punishment*, 10 CRIME & DELINQUENCY 105 (1964).

evenly—to execute a few stray men out of a "capital" criminal population of thousands.[117]

(15) The conclusion is inescapable, we think, that this rare penalty, inflicted upon the smallest handful of murderers, is no part of the regular criminal-law machinery of California or of any other State. It is a freakish aberration, a random extreme act of violence, visibly arbitrary and discriminatory—a penalty reserved for unusual application because, if it were usually used, it would affront universally shared standards of public decency. Such a penalty—not Law, but Terror—has no place in a democratic government. It is a cruel and unusual punishment, forbidden by the Eighth Amendment.

CONCLUSION

Trop v. Dulles said in 1958 that the death penalty could not be constitutionally condemned "in a day when it is still widely accepted."[118] In the same year, Justice Barry wrote:

> "The time when nations will cease to execute spies and traitors will not be seen while wars, hot or cold,

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(5) Finally, there seems no doubt that today capital punishment is more costly economically than the alternative of imprisonment, even for life. McGee, *Capital Punishment as Seen by a Correctional Administrator*, 28 FEDERAL PROBATION (No. 2) 11, 13-14 (1964); MacNamara, *Statement Against Capital Punishment*, in BEDAU 182, 192-193; West, *Medicine and Capital Punishment*, in *Hearings*, at 125; Testimony of Clinton T. Duffy, in *Hearings*, at 25-26. There is no need to document its other baneful effects on the administration of justice, which are commonplaces. *E.g.*, FRANKFURTER, OF LAW AND MEN (1956), 81, 84-85.

[117]WEIHOFEN 159-160, 163-164; LAWES, LIFE AND DEATH IN SING SING (1928), 154-155; PLAYFAIR & SINGTON, THE OFFENDERS (1957), 231; CALIFORNIA ASSEMBLY, REPORT OF THE SUBCOMMITTEE OF THE JUDICIARY COMMITTEE ON CAPITAL PUNISHMENT (1957), 27.

[118]*Trop v. Dulles*, 356 U.S. 86, 99 (1958) (plurality opinion of Chief Justice Warren).

inflame national passions and create a climate of fear and hatred. But plainly the distaste for death as a punishment for crimes that affect the individual and only indirectly the State is growing more general, and the complete abandonment of capital punishment as a feature of the criminal law is not far distant."[119]

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[119] Barry, *Hanged by the Neck Until . . .*, 2 SYDNEY L. REV. 401, 411 (1958).

The time foreseen by Justice Barry, and to which this Court in *Trop* deferred, has come. The Court should now reverse Earnest Aikens' sentence of death.[120]

Respectfully submitted,

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[120]Throughout this brief, we have relied upon only such factual assertions (regarding the rarity of the death penalty, its uneven application, and its harshness) as we believe that this Court can judicially notice. Those facts, however, are a small part of the factual evidence which condemns the death penalty as a cruel and unusual punishment. Counsel for petitioner have repeatedly sought evidentiary hearings in the courts of California and elsewhere at which they might prove all of the relevant facts through "the sharp legal and evidentiary clash between fully prepared adversary litigants which is traditionally expected in major constitutional cases." *Powell v. Texas*, 392 U.S. 514, 522 (1968). Such a hearing has been repeatedly refused. See, e.g., Petition for a Writ of Certiorari, in *Anderson et al. v. California*, O.T. 1968, No. 1643 Misc. [now O.T. 1971, No. 68-5007], pp. 22-30; Petition for a Writ of Certiorari, in *Forcella v. New Jersey*, O.T. 1968, No. 947 Misc. [decided sub nom. *Funicello v. New Jersey*, ___ U.S. ___, 29 L.ed.2d 859 (1971)], pp. 76-89.

We believe, for the reasons stated in this brief, that the death penalty is a constitutionally prohibited cruel and unusual punishment upon the judicially noticeable facts. But, should this Court conclude that further factual information is necessary or appropriate for disposition of the Eighth Amendment issue, it would appear proper to remand the present case to the California Supreme Court. That Court's decision of the Eighth Amendment question herein was based exclusively upon its decision in the Anderson case, see p. 6 *supra*; and if *Anderson* rests upon a basis that is inadequate to support proper constitutional adjudication, the present decision of the California Supreme Court is infirm. On the other hand, there are admitted procedural differences between the present direct appeal and the habeas corpus proceeding in *Anderson*; and the certiorari petition there raises the specific question whether a death-sentenced man is entitled to an evidentiary hearing upon specific proffers of proof going to Eighth Amendment questions.

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APPENDIX A

STATUTORY PROVISIONS INVOLVED

Cal. Penal Code, § 187
(West, 1970)
as it read prior to September 17, 1970

§187. Murder defined

Murder Defined. Murder is the unlawful killing of a human being, with malice aforethought.

Cal. Penal Code, § 188
(West, 1970)

§188. Malice, express malice, and implied malice defined

Malice Defined. Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.

Cal. Penal Code, § 189
(West, 1970)
as it read prior to August 23, 1969

§189. Murder; degrees

All murder which is perpetrated by means of poison, lying in wait, torture, or by any other kind of willful, deliberate, and premediated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, mayhem, or any act punishable under Section 288, is murder of the first degree; and all other kinds of murders are of the second degree.

Cal. Penal Code, § 190
(West, 1970)

§190. Murder; punishment; discretion of jury

Every person guilty of murder in the first degree shall suffer death, or confinement in the state prison for life, at

the discretion of the court or jury trying the same, and the matter of punishment shall be determined as provided in Section 190.1, and every person guilty of murder in the second degree is punishable by imprisonment in the state prison from five years to life.

Cal. Penal Code, § 190.1
(West, 1970)

§ 190.1. Sentences of death or imprisonment for life; determination; minors under 18

The guilt or innocence of every person charged with an offense for which the penalty is in the alternative death or imprisonment for life shall first be determined, without a finding as to penalty. If such person has been found guilty of an offense punishable by life imprisonment or death, and has been found sane on any plea of not guilty by reason of insanity, there shall thereupon be further proceedings on the issue of penalty, and the trier of fact shall fix the penalty. Evidence may be presented at the further proceedings on the issue of penalty, of the circumstances surrounding the crime, of the defendant's background and history, and of any facts in aggravation or mitigation of the penalty. The determination of the penalty of life imprisonment or death shall be in the discretion of the court or jury trying the issue of fact on the evidence presented, and the penalty fixed shall be expressly stated in the decision or verdict. The death penalty shall not be imposed, however, upon any person who was under the age of 18 years at the time of the commission of the crime. The burden of proof as to the age of said person shall be upon the defendant.

If the defendant was convicted by the court sitting without a jury, the trier of fact shall be the court. If the defendant was convicted by a plea of guilty, the trier of fact shall be a jury unless a jury is waived. If the defendant was convicted by a jury, the trier of fact shall be the same jury unless, for good cause shown, the court discharged that jury in which case a new jury shall be drawn to determine the issue of penalty.

In any case in which defendant has been found guilty by a jury, and the same or another jury, trying the issue of penalty, is unable to reach a unanimous verdict on the issue of penalty, the court shall dismiss the jury and either impose the punishment for life in lieu of ordering a new trial on the issue of penalty, or order a new jury impaneled to try the issue of penalty, but the issue of guilt shall not be retried by such jury.

Cal. Penal Code, § 3604
(West, 1970)

§ 3604. Method of execution; lethal gas

The punishment of death shall be inflicted by the administration of a lethal gas.

Cal. Penal Code, § 3605
(West, 1970)

§ 3605. Witnesses to execution; selection; exclusion of minors

The warden of the State prison where the execution is to take place must be present at the execution and must invite the presence of two physicians, the Attorney General of the State, and at least 12 reputable citizens, to be selected by him; and he shall at the request of the defendant, permit such ministers of the Gospel, not exceeding two, as the defendant may name, and any persons, relatives or friends, not to exceed five, to be present at the execution, together with such peace officers as he may think expedient, to witness the execution. But no other persons than those mentioned in this section can be present at the execution, nor can any person under age be allowed to witness the same.

Cal. Penal Code, § 187
(West, 1971 Cum. pocket part)
as amended September 17, 1970

§ 187. Murder defined; death of fetus

(a) Murder is the unlawful killing of a human being, or a fetus, with malice aforethought.

[Subsections (b) and (c) relate to the killing of a fetus.]

Cal. Penal Code, § 189
(West, 1971 Cum. pocket part)
as amended August 19, 1970[1a]

§ 189. Murder; degrees

All murder which is perpetrated by means of a destructive device or explosive, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premediated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, mayhem, or any act punishable under Section 288, is murder of the first degree; and all other kinds of murders are of the second degree.

As used in this section, "destructive device" shall mean any destructive device as defined in Section 12301, and "explosive" shall mean any explosive as defined in Section 12000 of the Health and Safety Code.

[1a]The statute as it read between August 23, 1969 (see Cal. Penal Code § 189, p. 1a *supra*) and August 19, 1970, contained the word "bomb" where the 1970 version has "destructive device or explosive"; and its second paragraph defined "bomb."

APPENDIX B

SUMMARY OF THE EVIDENCE RELATING TO THE KILLINGS OF MRS. EATON AND MRS. DODD

On January 31, 1966, following a protracted trial (TR. 3371),[1b] a judge of the Superior Court of Ventura County, California, convicted Petitioner Earnest James Aikens, Jr., a Negro (Tr. 2850), then twenty years old (Tr. A 91-92) of the first-degree murder of Mrs. Mary Winifred Eaton, a white woman (Tr . 2860). The court's remarks upon conviction are at Tr. 3372-3419. On March 21, 1966, following a protracted penalty trial (Tr. 3422-3419), the court sentenced him to death for this offense. Its remarks upon the sentence are at Tr. 4890-4992.

In a proceeding consolidated for trial, the judge also convicted petitioner of the first-degree murder of another white woman (Tr. 2860), twenty-five-year-old Mrs. Kathleen Nell Dodd (Tr. 2882), and fixed the penalty at life imprisonment in accordance with California law (Cal. Penal Code § 190.1), which prohibits imposition of the death penalty on any person who was under eighteen years of age when the murder was committed. Petitioner was just under seventeen when Mrs. Dodd was murdered on the night of April 3-4, 1962; he was twenty when Mrs. Eaton was murdered on April 26, 1965. (Tr. A 91-92)

At the penalty trial following petitioner's conviction on the charge of killing Mrs. Eaton, the prosecution introduced evidence that petitioner had also murdered Mr. Clyde J. Hardaway, a Negro man in his forties (Tr. 3424), on June 7, 1962, and forcibly raped a fifteen-year-old Negro girl (Tr. 4250, 4277), Dorthy Ann Piggee, on December 25, 1962.

[1b]The trial transcript (Reporter's Transcript) is in twenty volumes, including the guilt and penalty trials, and is cited herein as Tr.____. There is a one-volume Reporter's Transcript of pretrial proceedings, designated Volume A, cited herein as Tr. A ____. There is also a two-volume Clerk's Transcript in the Eaton matter (Cr. 5527) [cited 5507 R.____], and a one-volume Clerk's Transcript in the Dodd matter (Cr. 5705) [cited 5705 R.____], both of which contain exhibit indices to the trial.

Additional evidence of petitioner's repeated criminal activities appears throughout the record of the penalty trial, and is summarized in the court's finding set forth at p. 3-4 of the body of this brief.

Petitioner was indicted for the Eaton murder four days thereafter, on April 30, 1965 (5527 R. 1); and he was indicted for the Dodd murder August 13, 1965 (5705 R. 1), three years and four months after the date of the crime. Petitioner pleaded not guilty to each charge (Tr. A 38, 121), consented to the prosecutor's motion to consolidate the two trials (Tr. A 122), and waived trial by jury (Tr. A 168-175, 185-189; Tr. 3-4).

The prosecutor presented and argued both murders principally on the felony-murder theory, and the judge found that each killing occurred in the course of the commission of the felonies of burglary and/or robbery, and rape. (Tr. 3419). The prosecutor also argued, and the judge found, that premeditation could be inferred from the manner and circumstances of the murders. (Tr. 3419.) The prosecutor advanced other similarities which linked the murders to each other, and thus, he argued, to petitioner—including the fact that both victims lived within a short distance of petitioner's residence; the home of neither was entered forcibly; and each was killed with a knife from her own kitchen.

The proof concerning each murder was circumstantial including inconsistent various admissions and statements made by petitioner to fellow inmates and to authorities. Petitioner did not testify.

A. The Eaton Killing

The circumstances surrounding the Eaton murder were as follows:

Mrs. Mary Winifred Eaton lived with her husband, Frank Eaton, her adopted children, Eddie Eaton and Susan Mann, and her son-in-law, David Mann (Tr. 1741), at 396 South Santa Cruz St., Ventura, California, the north-east corner

house at Ocean Avenue, which runs east-west. On the day of her death, April 26, 1965, Mrs. Eaton had breakfast with her husband and her children at about 7:15 a.m. (Tr. 1770, 1741, 1806), then helped Eddie move furniture in the hall (Tr. 1806), so that she could work later at waxing floors, as she told Susan (Tr. 1742). Frank Eaton left for work at 7:35 (Tr. 848), and Susan left for school together with Eddie and David at 8:20 (Tr. 1741).

Mrs. Eaton apparently started waxing, using a liquid which she applied with a hand applicator. (Tr. 919.) At 10:00 no one at the Eaton home answered the knock of Mrs. Seidel, a commercial census compiler who knew Mrs. Eaton from earlier acquaintance. (Tr. 774). Mrs. Eaton was home, however, when Mrs. Seidel returned later in the morning; she spoke to Mrs. Seidel for a few moments, and showed her out between 11:00 and 11:30. (Tr. 775) She was the last person known to have seen Mrs. Eaton alive, except for her killer.

Frank Eaton discovered his wife's body at 6:45 p.m. (Tr. 1752), next to the bed in Eddie's room (Tr. 858), two hours after he had returned hom from work (Tr. 850). Susan and David Mann had returned an hour earlier, at 3:40 p.m. (Tr. 1742), and remained about the house without discovering Mrs. Eaton's body. The coroner who performed an autopsy the next morning, (Tr. 1631), Dr. Ridge, placed the time of death as "within four hours, probably somewhat less, from the time that [some (Tr. 1663)] orange . . . pulp was ingested." (Tr. 1664.) Mrs. Eaton probably ate her orange, not at breakfast (Tr. 1812), but with a snack later on, according to her custom (Tr. 895). Thus, the time of death might have been anywhere from 11:00 or 11:30 a.m., when Mrs. Seiden departed, to 3:40 p.m., when Susan and David Mann returned.

The intruder apparently did not forcibly break into Mrs. Eaton's home, nor were there signs of a struggle apart from an overturned vacuum cleaner. (Tr. 1746.) Sometime after the intruder's entrance, he either had Mrs. Eaton collect her

purses or tell him where they were; or he found them himself, since two empty purses were discovered near her body in Eddie's room. (Tr. 863.) Frank Eaton guessed that two $5 bills had been in Mrs. Eaton's wallet in her purse, and that about $7 was missing from the grocery purse in the kitchen. (Tr. 852, 857.)

Mrs. Eaton was taken to or attacked in Eddie's bedroom, where her hands were bound behind her with two belts (Tr. 904, 1359), and a terry cloth robe at some point was placed over her head (Tr. 1358), with the belt possibly gagging or choking her (Tr. 903). She was probably raped by the intruder on Eddie's bed, since two sperm and some seminal fluid were later identified on a vaginal smear. (Tr. 1890.) Although such a number of sperm does not ordinarily indicate recent sexual activity, (Tr. 1891), there was evidence that veneral disease can decrease the number of sperm which a man will emit (Tr. 1917), and that petitioner tested positively for gonorrhea on April 13, 1965 (Tr. 1941). Mrs. Eaton had last had sexual relations with her husband seven days earlier (Tr. 867), and he was probably physiologically incapable of producing sperm (Tr. 1596).

Mrs. Eaton was then viciously and fatally attacked with her bread knife (Tr. 1839), which the intruder had taken from the kitchen drawer (Tr. 1807). She was struck on the front right side of her neck, or perhaps choked, possibly rendering her unconscious (Tr. 1653, 1659), and was stabbed several times. One knife wound, and the major cause of death due to massive hemorrhage and shock, was a large, incised wound of the left and front surface of the neck extending to the front lateral right side, which completely severed the left jugular vein and the trachea and reached the spine. (Tr. 1633.) This wound indicated that there may have been two applications of force following the first incision. (Tr. 1641.) Mrs. Eaton also suffered a multiple superficial incision in the back of the neck (Tr. 1635), and a deep incised oval wound of the left chest in the front which penetrated the ribs, the left lung, the pericardial sac, and the heart, making five entries into the heart. (Tr. 1637). Before leaving, the

attacker apparently partially covered Mrs. Eaton's body with the bedding where it lay next to the bed (Tr. 861), washed the knife, and replaced it in the kitchen drawer (Tr. 1287).

The principal evidence identifying petitioner as Mrs. Eaton's killer was that he gave Mrs. Eaton's two rings to girlfriends in Pasadena on the evening of the murder. (Tr. 994, 1026, 1086, 1103.) Mrs. Eaton was wearing her rings the day before. (Tr. 845.) One of the rings was found, upon examination, to have on it a quantity of blood too small to type, and also some particles of wax that might have been the sort which Mrs. Eaton was using, or any other commercial floor wax. (Tr. 1847-1848, 1896-1906, 2407-2412.)

Petitioner's whereabouts during the morning and early afternoon of the murder were determined by fitting together the recollections of persons in the neighborhood from whom he was seeking employment. His time until 11:30, between 12:00 and 12:30, and after 1:00 was adequately accounted for, but the intervals from about 11:30 to 12:00 and from 12:30 to 1:00 were subject to doubt, and might have provided opportunities for commission of the murder. Petitioner lived not far from Mrs. Eaton's house. A loan company employee testified that she talked to him by phone at home at 10:10. (Tr. 659.) A neighbor of the Eatons testified that petitioner came to his house at 10:30 and asked to see his tenants (whose windows overlooked the rear of the Eaton house (Tr. 739-740, 752-753)). The tenants were out; petitioner was not admitted; and he next went to inquire about buying a car. (Tr. 722-723.) He was reported seen looking at cars on a commercial street at 10:30 (Tr. 757); seeking employment before 11:00 Don's Drive-in (Tr. 2377), "between 10 and 12 . . . around 11" at Scritchfield Motors (Tr. 2396-2397), and "at 11:30 . . . somewhere in that vicinity" at Poinsettia Bowling (Tr. 2382). The witness at Poinsettia suggested that petitioner should go to seek work at Scritchfield. It was two long blocks, five or ten minutes' walk, from Poinsettia or Scritchfield to Mrs. Eaton's house. (Tr. 3112.)

Petitioner was next seen at just about 12:00 noon by Mr. and Mrs. Shinavar, who lived across the street from the Eatons and a few feet to the north. (Tr. 788, 802.) Petitioner asked for work and Mr. Shinavar offered him a dollar if he could catch a gopher under his lawn. After talking for a while, petitioner said that he needed a job and needed money; and he left, walking north and across the street toward the home of Mrs. Lopez, two houses north of the Eaton house. (Tr. 804-805.) Mrs. Lopez recalled that petitioner knocked on her door at about 12:25 and asked for work. She told him she had none and he left, walking south toward Ocean Avenue. She remembered immediately telephoning at 12:27 to find out the time so she could catch a bus. (Tr. 650-652, 654.)

Mr. Shinavar saw petitioner again some time before 1:00 p.m., when petitioner returned with a cultivator and a piece of wire to use in poking for the gopher, and poked around for awhile. (Tr. 806-808.) Petitioner then walked the long block to his home on Ocean Avenue where his parole officer, Mr. Ansell, said he met petitioner at "no more than 10 minutes after 1:00." (Tr. 1372.) The time at which Mr. Shinavar saw petitioner return with the paraphernalia was fixed from several reference points. He testified that petitioner left "just before 1:00" after being at his house "somewhere around 20, 25 minutes," poking at the gopher hole, attempting to flush out the gopher, and talking to Mr. Shinavar. (Tr. 817.) He also stated that petitioner was gone "roughly 35, 40 minutes" between the first and second times that Mr. Shinavar saw him (Tr. 806), and that petitioner had left the first time at about 12:05 (Tr. 816). Mr. Shinavar testified that petitioner had told him that he had "scrounged" the wire and the cultivator "on the corner"–the Eatons' house–and that no one was home. (Tr. 808.) The cultivator had indeed been previously lying around the rear of the Eaton premises, broken and apparently scrapped (Tr. 865-866, 885-886, 906-907), and petitioner had been in and around the Eaton house on several occasions, as an acquaintance of Eddie Eaton (Tr. 886-887, 1803-1806).

Other circumstantial evidence connects petitioner to the crime. On the afternoon and evening of the murder and the next day petitioner was seen spending about $20, including three $5 bills. (Tr. 931-940.) Petitioner apparently had no money on the morning of the murder. (Tr. 1405.) On a black shirt which petitioner might have been wearing at the time the murder was committed (Tr. 747, 798, 882), the examining criminalist found two red wool fibers, one-sixteenth of an inch long (Tr. 1840), the same color as a blanket on the bed where Mrs. Eaton was killed (Tr. 1913). Although too small to identify with certainty, the fibers could have come from that blanket or from any similarly colored wool source. (Tr. 1914.) Finally, as noted above, petitioner was acquainted with the Eatons and their children, and thus might have been admitted to the house.

Neither footprints nor fingerprints of unidentified people were found about the house. (Tr. 1980.) Vacuuming of the entire house produced hair samples matching each of the persons and animals living in the house, and sixteen distinguishable unidentified samples, none however corresponding with petitioner's hair. (Tr. 1841.) Although the vaginal smear was tested for the presence of sperm, it was not subjected to an agglutination or absorption test (which is designed to type seminal fluid as blood is typed).[2b]

Fellow inmates and police authorities reported a number of statements by petitioner which appeared to constitute admissions or to indicate his consciousness of guilt:

In early May, David Luker, a trustee inmate in the county jail, said he asked petitioner "if he killed the woman and he said yes. He killed her but he didn't rape her." (Tr. 1698.)

[2b] See 12 AM JUR. PROOF OF FACTS (1962), §§ 13-20. Such tests have been held admissible for the purpose of excluding a possible suspect in a rape case. *People v. Kemp*, 55 Cal. 2d 458, 465, 359 P.2d 913, 916, 11 Cal. Rptr. 361, 364 (1961).

Bobby Williamson, a cell-mate, said that petitioner told him, on August 19, 1965, that "if they didn't get him out of that county jail he was going to kill someone else." (Tr. 1133.) Petitioner also told Williamson "that he knew who done it, but he didn't do it." (Tr. 1128-A.)

In October, petitioner told Police Lieutenant Urias, "Well, look, I'm a marked man. And now a story about some rings. I'm doomed." (Tr. 1721.)

The afternoon of the murder, driving home in the car of his parole officer, Mr. Ansell, petitioner said, "It seems like every time things start to go well for me something happens to mess it up." (Tr. 1383.) Ansell testified that the statement "at the time didn't seem odd" (Tr. 1383), and it may have had a general reference in the context of petitioner's first meeting with a new parole officer (Tr. 1371).

The evening following the murder, as petitioner was driving back to Ventura from Pasadena at 11:30 p.m., he said to an acquaintance: "When I gets back to Ventura the police will probably be waiting for me.... They will probably be sittin' on my doorsteps...." (Tr. 947.) Petitioner's reference, however, might have been to violation of his 10:00 p.m. parole curfew, since his mother had previously called police when he stayed out very late (Tr. 2103, 2185-2186).

On April 29, three days after the murder, petitioner told Inspector King during interrogation, "it was between eleven and twelve o'clock when she was dead. I know goddamn well I was at home then." (Tr. 1438). The prosecutor argued that no evidence in the case showed that petitioner had then been told that Mrs. Eaton had died at that time. (Tr. 2755.) The context of the interrogation indicates that a newspaper story was being discussed, however, and Inspector King's immediately preceding statement was: "I don't care what the paper said. That paper don't know everything that I know." (Tr. 1438.)

During the same interrogation, when Inspector King informed petitioner that Mrs. Eaton's rings had been found,

petitioner said, "Oh, man, I've been had. Them damn rings." (Tr. 1431.) Petitioner told a great many conflicting stories about where he had obtained the rings. He said that he had them "for so goddamn long it's been pitiful" (Tr. 1431), that he "bought them from some cat . . . down on the corner, yesterday" (Tr. 1436), and that when he "scrounged" the cultivator at the Eaton house he saw them "laying on the ground and I picked them up" (Tr. 1444). Petitioner told fellow inmate Bobby Williamson that "he went up to her house to borrow some tools . . . and knocked on the door and that the door was open, and he saw a ring laying inside the door . . . and then he saw another one . . . and picked that up." (Tr. 1129.)

On November 8, Deputy Sheriff Markley was asked by petitioner when he would get his shoes back and he told petitioner that they were being held as evidence. He testified that petitioner said, "'Those weren't even the shoes I were wearing when I–' And then he stopped himself–His face went blank." (Tr. 1823.)

B. The Dodd Killing

Three years before the Eaton murder, in April 1962, Mrs. Kathleen Nell Dodd lived with her husband, Robert, and her two small children (Tr. 57-58, 61) at the foot of South Hurst Street, a north-south street, where it dead-ends into the tracks of the Southern Pacific railroad to the south. (Tr. 145.) Like the Eaton house, the Dodd house was not far from petitioner's home on Ocean Avenue, but in the opposite direction–west along Ocean, then south along Hurst. (Tr. 151-152.) The Dodd neighborhood was apparently not a good one: Mrs. Dodd had expressed apprehension about her safety since transients frequented the area near the tracks, and the dead end of Hurst was something of a lovers' lane. (Tr. 2001-2006, 2032.)

Robert Dodd left his wife at home at 6:30 p.m. on the evening of April 3, 1962, and went to his usual evening college classes (Tr. 62), and then to Oxnard on business and to

a bar (Tr. 63). He frequently stayed out late studying at the sheriff's office where he worked as a deputy, or at the library. (Tr. 104, 105.) Mrs. Dodd made it a practice of locking her doors and not opening them before peeping out to ascertain the identity of visitors, even in the instance of friends who lived nearby and had called a few minutes earlier to say that they were coming over. (Tr. 2000.)

At some point during the evening, after her children were put to bed, Mrs. Dodd was watching television (Tr. 67) and drinking tea when someone came to the house and entered without forcing a lock, either upon admission by Mrs. Dodd, or because, on this occasion, a door had been left unfastened. (Tr. 111-112.) She spilled her tea (Tr. 68, 70), possibly because she was surprised by an intruder or in an attempt to escape from the house. She had once told a neighbor that if she were attacked in the house she would run outside to protect her children by leading the attacker away. (Tr. 2001.) The intruder probably took $60 from a drawer where Mr. Dodd testified he put rent money that he had collected (Tr. 80, 122, 2015); and he took a butcher knife from the kitchen rack (Tr. 83).

Mrs. Dodd, who was five months pregnant (Tr. 127), either went or was taken out through the front door to a spot on the railroad enbankment several hundred yards west of her house. (Tr. 153.) There was no struggle in the house (Tr. 67-68), and police later found no signs that Mrs. Dodd had been dragged to the embankment (Tr. 139-155, 180-227). At the railroad embankment she was raped (see Tr. 677), at a spot where impressions of a body and her panties and glasses were later found (Tr. 145-146).

At some time thereafter, Mrs. Dodd was able to put on her capri pants (Tr. 29, 669), and to go east down the tracks to the south side in the direction of some houses. One resident, Claire McWilliams, was awakened by a scream at about midnight, and ran outside with her dog to see Mrs. Dodd staggering up a neighbor's driveway, where she immediately collapsed and died. Mrs. McWilliams noticed

er dog barking while facing east, and then she heard wigs crackling in a northerly direction. (Tr . 26-33.) The olice later found signs of flattened grass, as though someone ad lain or crawled over it, in the area toward which the og was pointing. (Tr. 155.)

Mrs. Dodd died from several severe wounds suffered in a vage knife attack. The principal wounds were in her neck, e severing the artery that carries blood from the heart to e brain. (Tr. 180-181.) In addition to three more major ck wounds (Tr. 183-187), she was stabbed through the ck of the right arm and right chest wall into the lung r. 193-197), through the upper right abdomen into the er (Tr. 198), and deeply in the left shoulder (Tr. 201-202); e was cut several times on the left hand; (Tr. 203-205); d she had a number of abrasions and bruises (Tr. 189-191, 0-213).

Mr. Dodd returned home at 1:30 a.m. (Tr. 62), to find the ildren still asleep, the television set on, (Tr. 67-68), and e back door unlocked (Tr. 64-66). No one had witnessed s. Dodd's murder; and so again, the evidence connecting itioner to the crime was circumstantial.

The knife taken from the Dodd kitchen, marked with s. Dodd's blood, was found in some weeds between the ses at the western end of Ocean Avenue and the railroad cks, at a point on a line between the murder scene south the tracks and petitioner's home. (Tr. 144-145, 153.)

During the week before the murder, a brown car had been n parked at the dead-end of Hurst, near the Dodd resi- ce, from midnight until 5:00 a.m. (Tr. 2021). Petitioner bought a brown and tan Chevrolet the week before (Tr. 2-2435, 2479-2481); but the neighbor who described the icious vehicle said that it was a solid color (Tr. 2031).

green corduroy coat which petitioner was seen wearing he evening of April 3 was never seen thereafter by his ds. (Tr. 265, 573-574, 2190). On April 4 petitioner a scratch on his face which had not been seen the day re. (Tr. 238-340, 505.)

A crushed pack of Salem cigarettes and matches were found at the murder scene. (Tr. 140.) Petitioner sometimes smoked Salems, although he smoked a number of other brands as well, and Mrs. Dodd usually smoked Salems. (Tr. 92, 761, 1322, 1491, 2673-2676.)

Three or four days after the murder, petitioner was seen with money at a crap game. One witness said that petitioner lost $78 or $80. (Tr. 334-335.) Another said he saw petitioner with $250 toward the end of the game. (Tr. 576.)

These two witnesses were also with petitioner on the evening of the murder. They testified that they dropped him off at home at 11:00 p.m. (Tr. 237), after he said at 10:45 that he had a date that night with a white woman (Tr. 499). A number of petitioner's friends testified that petitioner had made various remarks concerning his interest in sexual relations with white women. (Tr. 238, 349.)

One of petitioner's two companions saw him the day after the murder at police headquarters, where petitioner told him that he was under suspicion of killing Mrs. Dodd. (Tr. 503.) The next day, according to the witness, petitioner said, "'I did it,' and I said, 'Well, what did you do?' . . . he said, "I killed that woman.' I said, 'What woman?' And he said, 'I killed the Dodd woman.' . . . he said, 'She was going to cut me loose.'" (Tr. 505.)

Petitioner explained the scratch on his face to the same witness by saying: "Nothin' but that good lovin'." (Tr. 506.) However, petitioner's other companion heard petitioner say that he got the scratch when Policewoman Ida Spellman slapped him,[3b] and then two or three days later that he had scratched his face in the garage on a nail (Tr. 241). When he confronted petitioner with this discrepancy, petitioner said, "he didn't want to talk about it." (Tr. 242.) Two or three days after the murder, when it was being discussed, petitioner said, "He didn't want to hear it." (Tr. 242.)

[3b]She testified that she had never slapped petitioner. (Tr. 607-608.)

While in jails, reform schools, and correctional institutions for much of the time between 1962 and 1965, petitioner made a number of incriminating statements to fellow inmates:

Gene Noreen was in Preston reform school with petitioner. While he was reading a comic book, petitioner came over and told him that petitioner had raped and killed a sheriff's wife. (Tr. 427-428, 440.) Petitioner "came over and . . . was just bragging about killing and [sic] old gal and raping her." (Tr. 428.) "[H]e just said he cut her up and raped her, . . . he said he come up to the door, knocked, and she come to the door, she opened it a crack, and he pushed his way in, and he was fighting with her, running around with her, and she scratched him, and it made him mad, and he tore some of her clothes off and chased her, and finally she tripped or fell or something, and it made him mad, and he cut her up." (Tr. 432.)

Barney White was with petitioner in Juvenile Hall in July, 1962. He testified that petitioner "was talking about burglaries and different things, and he said he was burglarizing the house over in Ventura, and he went into this one house, through the back door there by the kitchen, and this lady, Mrs. Dodd, came into the kitchen and told him to get out or—she asked him what he was doing . . . and he picked up a knife there and . . . chased her outside and around the house, through a field over by the railroad tracks and stabbed and killed her and raped her." (Tr. 456.)

Bennie Rochester, who was in jail with petitioner at the same time, said that after they saw Deputy Dodd at the jail, petitioner told Rochester that he had killed Dodd's wife. (Tr. 469.) Petitioner later told Rochester that this story was untrue; that he was just kidding. (Tr. 470-471.)

Richard Carreiro was at Preston with petitioner in 1962 and at another reform school with him in 1963. He said that petitioner told him "just that he got into an argument with her and he had killed a white girl . . . he was in the house . . . and slapped her around . . . she started running. He was

chasing her through back ways, caught her in the yard and stabbed her." (Tr. 475-476.)

On the first day of the trial, petitioner also made the following three remarks to the deputy who was guarding him: When Mrs. McWilliams was testifying concerning her discovery of Mrs. Dodd's body, petitioner said, "She is saying things that only I know." (Tr. 1826). When Mr. Dodd was testifying to the amount of money that was in the drawer at his home, petitioner told him, "He wouldn't know that unless someone told him." (Tr. 1827). Finally, when Mrs. McWilliams was testifying that her son followed her out of the house with a gun, petitioner said, "They were out there to kill me." (Tr. 1827.)

APPENDIX C

PUNISHMENTS AUTHORIZED BY LAW AND USAGE, 1786–1800

This appendix sets out some of the punishments authorized by law and commonly used in America at the time of drafting and adoption of the Eighth Amendment. Part A lists provisions of colonial, state and federal law authorizing corporal punishments other than death for freemen. Part B lists the same provisions for slaves. Part C describes the customs of infliction of the punishments. Part D deals with the penalty of banishment.

A. Penal Laws Applicable to Freemen

UNITED STATES

CRIME	PUNISHMENT	SOURCE
Theft	Whipping, no more than thirty-nine stripes	1 Stat. 112, 116 (Act of April 30, 1790, ch. 9, § 16)
Receiving stolen goods	Whipping, no more than thirty-nine stripes	1 Stat. 112, 116 (Act of April 30, 1790, ch. 9, § 17)
Perjury	The pillory, one hour	1 Stat. 112, 116 (Act of April 30, 1790, ch. 9, § 18)

CONNECTICUT

Acts and Laws of the State of Connecticut in America, Printed by Elisha Babcock (Hartford, 1786) (1 vol.)

CRIME	PUNISHMENT	SOURCE
Adultery	Whipping on bare body; burning of letter "A" in forehead; wearing of metal halter around the neck for rest of life	p. 8 (date of original enactment is not given for any of these laws in force in 1786)

Burglary (not aggravated)	Whipping, no more than forty stripes	p. 18
Counterfeiting (1st offense)	Whipping, no more than twenty stripes	p. 24
Counterfeiting (2nd offense)	Whipping, no more than thirty stripes (also imprisonment for life)	p. 24
Defamation of any Court	Banishment	p. 38
Drunkenness	The stocks, one hour (if unable to pay eight shilling fine)	p. 43
Fornication	Whipping, no more than ten stripes (if unable to pay thirty-three shilling fine)	p. 87
Incest	Whipping, no more than forty stripes; wearing of a capital "I" on clothing forever	p. 136
Mansalughter	Whipping; burning in hand of letter "M"	p. 135
Perjury	The pillory, one hour; nailing of both ears (if unable to pay twenty-pound fine)	p. 191
Rioting	Whipping, no more than forty stripes	p. 205
Theft	Whipping, no more than ten stripes	p. 245

DELAWARE

Laws of the State of Delaware, published by Authority, printed by Samuel and John Adams (Newcastle, 1797) (2 vols.)

CRIME	PUNISHMENT	SOURCE
Murders and felons	Buring in hand of letter "M" or "T"	vol. 1, p. 72 (enacted 1719, ch. 22a, § 27)
Adultory or fornication	Whipping, twenty-one lashes	vol. 1, p. 105 (ch. 44, § 1) (date of original enactment of these laws in force in 1797)
Whitewomen bearing mulatto child	The pillory, two hours; whipping, thirty-nine stripes	vol. 1, p. 108 (ch. 44, § 9)
Whiteman fornicating with Negro	Whipping, twenty-one lashes	vol. 1, p. 109 (ch. 44, § 10)
Blasphemy	The pillory, two hours; branding in forehead of letter "B"; whipping, thirty-nine lashes	vol. 1, p. 174 (ch. 67a, § 5)
Drunkeness or swearing	The stocks, no more than three hours	vol. 1, p. 174 (ch. 67a, §§ 2 & 4)
Free Negro dealing with slave	Whipping, no more than twenty-one lashes	vol. 1, p. 215 (ch. 77a, § 12)
Receiving stolen goods	Whipping, twenty-one lashes; branding in forehead of letter "R"	Vol. 1, p. 238 (ch. 90 § 9)
Larcency (1st offense)	Whipping, no more than twenty-one lashes; wearing of "T" on clothing for six months	vol. 1, p. 296 (ch. 120a, § 1)
Larceny (2nd offense)	Whipping, no more than thirty-one lashes; the pillory, two hours	vol. 1, p. 297 (ch. 120, § 2)

Horse or slave stealing	The pillory, one hour; whipping, thirty-nine stripes; severing the soft part of one ear.	vol. 2, p. 668 (enacted 1779, ch. 45, § 1)
Counterfeiting or embezzling	The pillory, one hour; whipping, thirty-nine stripes; severing the soft part of one ear.	vol. 2, p. 773 (enacted Feb. 8, 1783, ch. 96)

GEORGIA

A Digest of the Laws of the State of Georgia, by Robert and George Watkins, printed by R. Aitken (Philadelphia, 1800) (1 vol.)

CRIME	PUNISHMENT	SOURCE
Selling goods on Sunday	The stocks, two hours (if unable to pay ten shilling fine)	p. 81 (enacted March 4, 1762, Act. no. 88)
Winning money by fraud or deceit	Corporal punishment	p. 95 (enacted Feb. 29, 1764, Act no. 111)
Counterfeiting	Three public whippings	p. 181 (enacted Sept. 29, 1773, Act no. 213)
Horse stealing	The pillory, two hours to four hours; three public whippings of thirty-nine lashes each; branding in shoulder of letter "R"	p. 184 (enacted Sept. 29, 1773, Act no. 220)
Maiming	The pillory; whipping. no more than one hundred stripes (if unable to pay one hundred pound fine)	p. 357 (enacted Feb. 10, 1787, Act no. 372)
Vagabond unable to find work	Whipping, no more than thirty-nine lashes	p. 377 (enacted Feb. 1, 1788, Act no. 391)

MARYLAND

ıe Laws of Maryland, Revised and Collected, under the ıthority of the Legislature, by William Kilty, printed by ederick Green, Printer to the State (Annapolis, 1799) (2 ls.)

CRIME	PUNISHMENT	SOURCE
jury	The pillory, two hours; nailing of both ears (if unable to pay 20 shilling fine)	vol. 1, unpaginated (enacted 1692, ch. 16, § 4)
every	The pillory, whipping, no more than forty stripes	vol. 1, unpaginated (enacted June 3, 1715, ch. 26, § 2)
ng unmarked ıe	The pillory; whipping, no more than forty stripes	vol. 1, unpaginated (enacted June 3, 1715, ch. 26, § 5)
phemy offense)	Boring through the tongue	vol. 1, unpaginated (enacted Oct. 26, 1723, ch. 16 § 1)
phemy offense)	Branding in fore-head of letter "B"	vol. 1, unpaginated (enacted Oct. 26, 1723, ch. 16, § 1)
oring escaped	Whipping, no more than thirty-nine stripes (if unable to pay fine of up to 600 pounds of tobacco)	vol. 1, unpaginated (enacted May 1748, ch. 19, § 3)

MASSACHUSETTS

The Perpetual Laws of the Commonwealth of Massachusetts, compiled, arranged and printed to the wishes of many respectable law characters, and the approbation of the Honorable Judges of the Supreme Judicial Court, printed by Isaiah Thomas (Worcester, 1788) (1 vol.)

CRIME	PUNISHMENT	SOURCE
Conveying any tool or instrument into a prison (if it aids an escape)	Whipping, no more than forty stripes; the pillory	p. 41 (enacted Feb. 21, 1785)
Frauds on the Massachusetts Bank	The pillory, two hours	p. 189 (enacted March 16, 1784)
Trespass or vandalism at night	Whipping, no more than twenty stripes	p. 216 (enacted Nov. 23, 1785)
Selling unwholesome provisions	The pillory	p. 221 (enacted March 8, 1785)
Counterfeiting	The pillory, one hour; severing of ear; whipping, no more than forty stripes	p. 224 (enacted July 4, 1786)
Forgery	The pillory; cropping of one ear	p. 226 (enacted March 16, 1785)
Violation of National Bank Act	The pillory, up to three times; severing of one ear; whipping no more than four times, thirty nine stripes each; branding in forehead of letter "F"	p. 228 (enacted Nov. 1, 1785)
Theft (1st offense)	Whipping, no more than thirty nine stripes	p. 228 (enacted March 15, 1785)
Theft (2nd offense)	Whipping, branding in right cheek of letter "T"	pp. 229-230 (enacted March 18, 1785)

Breaking and entering (2nd offense)	Whipping; branding in both cheeks of letter "B"	p. 230 (enacted March 15, 1785)
Perjury	The pillory, two hours; whipping, no more than thirty-nine stripes	p. 234 (enacted March 9, 1785)
Blasphemy	The pillory; whipping	p. 235 (enacted July 3, 1782)
Failure to disperse	Whipping, thirty-nine stripes	p. 244 (enacted Oct. 28, 1786)
Adultery	Whipping, no more than thirty-nine stripes	p. 244 (enacted Feb. 17, 1785)
Polygamy	Whipping, no more than thirty-nine stripes	p. 245 (enacted Feb. 17, 1785)
Fornication	Whipping, no more than ten stripes (if unable to pay thirty shilling to five pound fine)	p. 246 (enacted March 15, 1786
Dueling	Whipping, no more than thirty-nine stripes	p. 248 (enacted June 30, 1784
Manslaughter	Branding in forehead of letter "M"	p. 249 (enacted Feb. 28, 1785)
Daylight arson	The pillory, three times; whipping, four times	p. 249 (enacted March 11, 1785
Assault with felonious intent	The pillory; whipping	p. 250 (enacted March 9, 1785)
Harboring felons	The pillory	p. 252 (enacted March 15, 1785)
Felonious Assault	The pillory, three times; whipping, no more than thirty-nine stripes	p. 252-253 (enacted March 15, 1785)

Negro remaining in Massachusetts after being ordered to leave	Whipping, no more than ten stripes	p. 349 (enacted March 26, 1788)

NEW HAMPSHIRE

Laws of New Hampshire, edited by Albert Stillman Batchellor, published by the John B. Clarke Company (Manchester, 1904) (10 vols.)

CRIME	PUNISHMENT	SOURCE
Adultery	Whipping, no more than forty stripes; wearing of two-inch letter "A" on clothing forever	vol. 1, p. 676 (enacted June 14, 1701, ch. 6)
Swearing	The stocks, two hours (if unable to pay one shilling fine)	vol. 1, p. 677 (enacted June 14, 1701, ch. 7)
Drunkenness	The stocks, two hours (if unable to pay one shilling fine)	vol. 1, p. 678 (enacted June 14, 1701, ch. 7)
Stealing	Whipping, twenty stripes	vol. 1, p. 678 (enacted June 14, 1701, ch. 7)
Fornication	Whipping, ten stripes	vol. 1, p. 678 (enacted June 14, 1701, ch. 7)
Incest	Whipping, no more than forty stripes; wearing of two-inch capital "I" on clothing forever	vol. 2, p. 125 (enacted May 15, 1714, ch. 5)
Receiving stolen goods	Whipping, no more than twenty stripes (if unable to make restitution)	vol. 2, p. 129 (enacted May 15, 1714, ch. 9)
Disorderly persons not working	Whipping, the stocks	vol. 2, p. 269 (enacted May 14, 1718, ch. 15)
Assault on a woman	Whipping, no more than ten stripes	vol. 2, p. 281 (enacted May 14, 1718, ch. 19)

Blasphemy	The pillory; whipping; boring through the tongue with a red-hot iron (no more than two of these to be inflicted for one act)	vol. 2, p. 314 (enacted May 14, 1718, ch. 38)
Swearing by common sailor	The stocks, two hours; whipping, ten to twenty stripes (if unable to pay four to eight shilling fine)	vol. 3, p. 30 (enacted June 18, 1747, ch. 4)
Breaking street lamp by Indian	Whipping, no more than ten stripes (if unable to pay ten pound fine)	vol. 3, p. 73 (enacted March 2, 1754, ch. 6)
Rioting	Whipping, thirty stripes	vol. 3, p. 78 (enacted April 22, 1754, ch. 10)
Counterfeiting	The pillory, one hour; cropping of one ear; whipping, no more than twenty stripes	vol. 3, p. 613 (enacted Jan. 28, 1774, ch. 7)

NEW YORK

Laws of the State of New York, Comprising the Constitution and the Acts of the Legislature, printed by Thomas Greenleaf (New York, 1792) (2 vols.)

CRIME	PUNISHMENT	SOURCE
Petty larceny	Corporal punishment, including whipping, no more than thirty-nine lashes	vol. 1, p. 422, (enacted March 24, 1787, Tenth sess., ch. 65, § 1)
Perjury or subornation of perjury	The pillory, one hour (if unable to pay one hundred pound fine)	vol. 2, p. 36 (enacted Feb. 7, 1788, Eleventh sess., ch. 17, §§ 1-2)
Disorderly persons	Correction by whipping	vol. 2, p. 53 (enacted Feb. 9, 1788, Eleventh session, ch. 31, § 3)

Deceitful gaming	Corporal punishment	vol. 2, p. 62 (enacted Feb. 20, 1788, Eleventh sess., ch. 35, § 5)
Swearing	The stocks, two hours (if unable to pay three shilling fine)	vol. 2, p. 91 (enacted Feb. 23, 1788, Eleventh sess., ch. 42, § 6)
Grave robbing	The pillory; corporal punishment	vol. 2, p. 219 (enacted Jan. 6, 1789, Twelfth sess., ch. 3, § 1)

NORTH CAROLINA

Laws of the State of North Carolina, published according to an Act of Assembly, by James Iredell, now one of the Associate Justices of the Supreme Court of the United States, printed by Hodge & Wills, Printers to the State of North Carolina (Edenton, 1791) (1 vol.)

CRIME	PUNISHMENT	SOURCE
Stealing cattle or hogs (1st offense)	Whipping, forty lashes	p. 73 (enacted 1741, ch. 8, § 2)
Stealing cattle or hogs (2nd offense)	Whipping, forty lashes; the pillory, two hours; branding in left hand of letter "T"	p. 73 (enacted 1741, ch. 8, § 2)
Free Negro, mullato or Indian giving false testimony	Nailing of one ear; the pillory, one hour; severing of ear; repeated with other ear; whipping thirty-nine lashes	p. 94 (enacted 1741, ch. 24, § 50)
Subor ning perjury	The pillory, one hour; nailing of one ear	p. 287 (enacted 1777, ch. 5, § 1)
Perjury	The pillory, one hour; nailing of both ears; severing of both ears	p. 288 (enacted 1777, ch. 5, § 11)

Counterfeiting	The pillory, three hours; nailing of right ear; severing of right ear; whipping, thirty-nine lashes; branding in right cheek of letter "C" (brand to be at least 1" x ¾")	p. 389 (enacted 1779, ch. 8, § 2)
?ssing counterfeit ertificates	The pillory, one hour; severing of one ear; whipping, thirty-nine lashes	p. 390 (enacted 1779, ch. 8, § 3)
lunting in woods y fire light	Whipping, thirty-nine lashes	p. 507 (enacted 1784, ch. 33, § 1)
'agrancy (repeat ffender)	Whipping, thirty-nine lashes	p. 508 (enacted 1784 ch. 34, § 2)
orse stealing	The pillory, one hour; nailing of both ears; severing of both ears; branding in right cheek of letter "H"; branding in left cheek of letter "T"	p. 580 (enacted 1786, ch. 7, § 1)

PENNSYLVANIA

ws of the Commonwealth of Pennsylvania, published der the Authority of the Legislature by Alexander James illas, Printed by Hall and Sellers (Philadelphia, 1797) vols.)

CRIME	PUNISHMENT	SOURCE
gery	The pillory	vol. 1, p. 5 (enacted 1700, ch. 16)
ultery d offense)	Whipping, twenty-one lashes; branding in forehead of letter "A"	vol. 1, p. 47 (enacted 1705, ch. 122, § 1)
my	Whipping, thirty-nine lashes	vol. 1, p. 49 (enacted 1705, ch. 123)

Woman convicted of felony	Burning in hand with letter "T"	vol. 1, p. 141 (enacted 1718, ch. 247, § 21)
Larceny (1st offense)	Whipping, twenty-one stripes	vol. 1, p. 144 (enacted 1718, ch. 247, § 29)
Larceny (2nd offense)	Whipping, twenty-one to forty stripes	vol. 1, p. 144 (enacted 1718, ch. 247, § 29)
Larceny (3rd offense)	Whipping, thirty-nine to fifty stripes	vol. 1, p. 144 (enacted 1718, ch. 247, § 29)
Counterfeiting	The pillory, one hour; nailing and severing of both ears; whipping, twenty-one lashes	vol. 1, p. 477 (enacted 1767, ch. 567, § 2)
Horse stealing	The pillory, one hour; whipping, thirty-nine lashes	vol. 1, p. 477 (enacted 1767, ch. 567, § 3)
Breaking into a public building at night	The pillory, one hour; nailing and severing of both ears; whipping, twenty-one lashes	vol. 1, p. 622 (enacted 1772, ch. 663, § 2)
Altering the denomination of bank notes	The pillory, one hour; nailing and severing of both ears; whipping, twenty-one lashes	vol. 2, p. 104 (enacted 1783, ch. 66, § 15

RHODE ISLAND

The Public Laws of the State of Rhode Island and Providence Plantations, published by Authority, printed by Carter and Wilkinson (Providence, 1798) (1 vol.)

CRIME	PUNISHMENT	SOURCE
Counterfeiting	The pillory; cropping of both ears; branding with letter "C"	p. 586 (§ 9) (date of original enactment is not given for any of these laws in force in 1798)
Falsification of Court Records	The pillory; cropping of both ears; branding	p. 588 (§ 10)

Perjury	The pillory; cropping of both ears; branding	p. 588 (§ 11)
Horsestealing	Whipping, no more than ten stripes	p. 590 (§ 18)
Theft	Whipping, no more than twenty stripes (if unable to pay twenty dollar fine)	p. 593 (§ 25)

SOUTH CAROLINA

The Public Laws of the State of South Carolina, by the Honorable John Faucheraud Grimké, Esq., printed by R. Aitken & Son (Philadelphia, 1970) (1 vol.)

CRIME	PUNISHMENT	SOURCE
Bastardy (1st offense)	Whipping, no more than thirty-one stripes (if unable to pay five to ten shilling fine)	p. 5 (enacted Sept. 17, 1703, Act no. 213)
Bastardy (2nd offense)	Whppings, no more than thirty-nine stripes (if unable to pay five to ten shilling fine)	p. 5 (enacted Sept. 17, 1703, Act no. 213)
Bastardy (3rd offense)	Tying to tail of cart and whipping through streets	p. 5 (enacted Sept. 17, 1703, Act no. 213)
Receiving stolen goods	The pillory; whipping	p. 274 (enacted Aug. 23, 1769, Act no. 1096)
Defacing of coins	The pillory, two days, one hour each day	p. 398 (enacted Oct. 12, 1785, Act no. 1408)
Stealing livestock (1st offense)	Whipping, no more than thirty-nine lashes	p. 486 (enacted March 13, 1789, Act no. 1577)
Stealing livestock (2nd offense)	Whipping, no more than fifty lashes	p. 486 (enacted March 13, 1789, Act no. 1577)

VERMONT

Statutes of the State of Vermont, Revised and established by Authority, in the year 1787, including those passed since that period until . . . January 1791, printed by Anthony Haswell (Bennington, 1791) (1 vol.)

CRIME	PUNISHMENT	SOURCE
Adultery	Whipping, no more than thirty-nine stripes; wearing of a two-inch capital "A" on clothing forever	p. 17 (enacted March 8, 1787)
Failure to wear letter "A"	Whipping, no more than ten stripes	p. 17 (enacted March 8, 1787)
Counterfeiting	Severing of right ear; branding of capital "C" with hot iron	p. 37 (enacted March 8, 1787)
Defamation	Banishment	p. 48 (enacted March 9, 1787)
Swearing, cursing or drunkenness	The stocks, one to three hours (if unable to pay six shilling fine)	pp. 50-51 (enacted Feb. 28, 1787)
Blasphemy	Whipping, no more than forty stripes; the pillory, one hour	p. 75 (enacted March 8, 1787)
Manslaughter	Whipping, no more than forty stripes; branding in hand of letter "M"	p. 75 (enacted March 8, 1787)
Theft, when not attended by force or violence	Whipping, no more than forty stripes	p. 76 (enacted March 8, 1787)
Incest	Whipping, no more than thirty-nine stripes; wearing of two inch capital letter "I" on clothing forever	p. 104 (enacted Feb. 27, 1787)

erjury	The pillory, two hours; nailing and severing of both ears (if unable to pay 30 pound fine)	p. 124 (enacted March 8, 1787)
orgery	The pillory, three days, two hours each day	p. 125 (enacted March 8, 1787)
heft	Whipping, no more more than thirty-nine lashes	p. 181 (enacted Feb. 27, 1787
orse stealing	Branding in forehead of letters "H.T."; severing of both ears	p. 282 (enacted Oct. 29, 1791)
ape	Whipping, no more than one-hundred stripes; wearing of two inch capital letter "R" on clothing forever	p. 294 (enacted Nov. 1, 1791)

VIRGINIA

Collection of All Such Acts of the General Assembly of irginia of a public and permanent nature, as are now in rce, printed by Augustine Davis, Printer for the Common-ealth (Richmond, 1794) (1 vol.)

CRIME	PUNISHMENT	SOURCE
lling unwholesome at or drink (2nd fense)	The pillory	p. 34 (enacted Nov. 27, 1786, ch. 23)
aud	The pillory	p. 50 (enacted Nov. 18, 1789, ch. 45, § 2)
g-stealing	The pillory, two hours; nailing of both ears	p. 186 (enacted Dec. 8, 1792, ch. 98, § 2)

Swearing, cursing or drunkenness	Whipping, ten lashes (if unable to pay eighty-three cent fine)	p. 286 (enacted Dec. 26, 1792, ch. 138, § 1)
Buying from or selling to slave	Whipping, thirty-nine lashes	p. 198 (enacted Dec. 17, 1792, ch. 103, §16)
Buying from or selling to white servant without leave	Whipping, thirty-nine lashes	p. 259 (enacted Dec. 26, 1792, ch. 132, § 10)

B. Penal Laws Applicable To Slaves

CONNECTICUT

Acts and Laws of the State of Connecticut in America, printed by Elisha Babcock (Hartford, 1786) (1 vol.)

CRIME	PUNISHMENT	SOURCE
Defamation	Whipping, no more than forty stripes	p. 38 (date of original enactment is not given for any of these laws in force in 1786
Breaking the peace	Whipping, no more than thirty stripes	p. 188
Stealing	Whipping, no more than thirty stripes	p. 233
Going abroad after 9 o'clock	Whipping, no more than ten stripes	p. 234

DELAWARE

Laws of the State of Delaware, published by Authority, printed by Samuel and John Adams (Newcastle, 1797) (2 vols.)

CRIME	PUNISHMENT	SOURCE
Attempted rape of white woman	The pillory, four hours; nailing and severing of both ears	vol. 1, p. 104 (ch. 43, § 5) (Date of original enactment is not given for some of these laws in force in 1797)

Negro fathering child by white woman	The pillory, two hours; nailing and severing of one ear; whipping, thirty nine lashes	vol. 1, p. 109 (ch. 44, § 9)
Killing deer out of season	Whipping, no more than twenty-one stripes	vol. 1, p. 191–192 (ch. 74, § 3)
Building fire in woods out of season	Whipping, no more thirty-one stripes	vol. 1, p. 213 (ch. 80, § 1)
Assaulting a white person	The pillory, two hours; whipping no more than thirty-nine lashes	vol. 1, p. 307 (ch. 126, § 6)
Assaulting another slave	Whipping, no more than thirty-nine lashes	vol. 1, p. 436 (enacted Oct. 31, 1767, ch. 188 § 3)

GEORGIA

A Digest of the Laws of the State of Georgia, by Robert and George Watkins, printed by R. Aitken, (Philadelphia, 1800) (1 vol.)

CRIME	PUNISHMENT	SOURCE
Wandering about without white person	Whipping, no more than twenty lashes	165 (enacted May 10, 1770, Act no. 204)
Attending illegal slave meeting	Whipping, no more than twenty-five lashes	p. 166 (enacted May 10, 1770, Act no. 204)
Administering medicine without white direction	Whipping, no more than fifty lashes	p. 169 (enacted May 10, 1770, Act no. 204)
More than seven male slaves traveling without white person	Whipping, no more than twenty lashes	p. 177 (enacted May 10, 1770, Act no. 204)

MARYLAND

The Laws of Maryland, Revised and Collected, under the Authority of the Legislature, by William Kilty, printed by Frederick Green, Printer to the State (Annapolis, 1799) (2 vols.)

CRIME	PUNISHMENT	SOURCE
Stealing	Whipping, no more than forty stripes	vol. 1, unpaginated (enacted 1717, ch. 13, § 6)
Striking of white person	Cropping of one ear	vol. 1, unpaginated (enacted 1723, ch. 15, § 4)
Unlawful assembly	Whipping, no more than thirty-nine stripes	vol. 1, unpaginated (enacted 1723, ch. 15, § 2)
Giving of false testimony	Whipping, thirty-nine stripes; cropping of one ear; the next day the other ear is cropped and thirty-nine more stripes given	vol. 1, unpaginated (enacted June 8, 1751, ch. 14, § 5)
Rambling or running away	Whipping; cropping of one ear or branding in cheek with letter "R"	vol. 1, unpaginated (enacted June 8, 1751, ch. 14, § 8)

NEW HAMPSHIRE

Laws of New Hampshire, edited by Albert Stillman Batchellor, published by The John B. Clarke Company (Manchester, 1904) (10 vols.)

CRIME	PUNISHMENT	SOURCE
Cursing or swearing	Whipping, ten to twenty stripes (if unable to pay four to eight shilling fine)	vol. 3, p. 30 (enacted June 18, 1747, ch. 4)
Breaking street lamps (1st offense)	Whipping, no more than ten stripes	vol. 3, p. 73 (enacted March 2, 1754, ch. 6)

reaking street lamps (2nd offense)	Whipping, no more than twenty stripes	vol. 3, p. 73 (enacted March 2, 1754, ch. 6)

NEW JERSEY

aws of the State of New Jersey, Revised and published nder Authority of the Legislature, by William Paterson, rinted by Mathias Day (Newark, 1800) (1 vol.)

CRIME	PUNISHMENT	SOUREC
etting deer trap	Whipping, thirty lashes (if unable to pay five pound fine)	p. 20 (enacted Dec. 21, 1771, § 8)

NEW YORK

aws of the State of New York, Comprising the Constitu- on and the Acts of the Legislature, printed by Thomas reenleaf (New York, 1792) (2 vols.)

CRIME	PUNISHMENT	SOURCE
scharge of gun or eworks to the uthward of fresh ter	Whipping, no more than thirty-nine stripes	vol. 1, p. 272 (enacted April 22, 1786, Ninth sess., ch. 43, § 2)

NORTH CAROLINA

ws of the State of North Carolina, published according an Act of Assembly, by James Iredell, now one of the sociate Justices of the Supreme Court of the United ates, printed by Hodge & Wills, Printers to the State of rth Carolina (Edenton, 1791) (1 vol.)

CRIME	PUNISHMENT	SOURCE
ling deer out season	Whipping, thirty lashes	p. 58 (enacted 1738, ch. 10, § 3)
aling cattle or gs	Severing of both ears; whipping	p. 74 (enacted 1741, ch. 8, § 10)
aling boat or oe	Whipping, no more than thirty-nine lashes	p. 77 (enacted 1741, ch. 13, § 4)

Possession of firearm	Whipping, twenty lashes	p. 93 (enacted 1741, ch. 24, § 40)
Misdemeanor	Whipping, no more than forty lashes	p. 462 (enacted 1783, ch. 14, § 2)
Hunting in woods by firelight	Whipping, thirty-nine lashes	p. 507 (enacted 1784, ch. 33, § 3)
Selling of any article without permission	Whipping, no more than thirty-nine lashes	p. 643 (enacted 1788, ch. 7, § 2)

PENNSYLVANIA

Laws of the Commonwealth of Pennsylvania, published under the Authority of the Legislature by Alexander James Dallas, printed by Hall & Sellers (Philadelphia, 1797) (4 vols.)

CRIME	PUNISHMENT	SOURCE
Killing deer out of season	Whipping, no more than thirty-one lashes (if unable to pay forty shilling fine)	vol. 1, p. 393 (enacted 1760, ch. 467, § 9)

SOUTH CAROLINA

The Public Laws of the State of South Carolina, by the Honable John Faucheraud Grimké, Esq., printed by R. Aitken & Son (Philadelphia, 1790) (1 vol.)

CRIME	PUNISHMENT	SOURCE
Night hunting of deer with fire	Whipping, no more than thirty-nine lashes	p. 497 (enacted March 13, 1789, Act no. 1586)
Stealing of boats or canoes (1st offense)	Whipping, thirty-nine lashes	p. 2 (enacted March 16, 1695-96, Act no. 126)
Away from home without ticket	Whipping, no more than twnety lashes	p. 164 (enacted May 10, 1740, Act no. 695)
Buying or selling goods	Whipping, no more than twenty lashes	p. 171 (enacted May 10, 1740, Act no. 695)
More than seven male slaves traveling	Whipping, no more than twenty lashes	p. 174 (enacted May 10, 1740, Act no. 695)

Marking or branding livestock	Whipping, no more than fifty lashes	p. 486 (enacted March 13, 1789, Act no. 1577)

VIRGINIA

A Collection of All Such Acts of the General Assembly of Virginia of a public and permanent nature, as are now in force, printed by Augustine Davis, Printer for the Commonwealth (Richmond, 1794) (1 vol.)

CRIME	PUNISHMENT	SOURCE
Hog-stealing (1st offense)	Whipping, thirty-nine lashes	p. 187 (enacted Dec. 8, 1792, ch. 98, § 4)
Hog-stealing (2nd offense)	The pillory, two hours; nailing of both ears	p. 187 (enacted Dec. 8, 1792, ch. 98, § 4)
Possession of firearms	Whipping, thirty-nine lashes	p. 196 (enacted Dec. 17, 1792, ch. 103, § 8)
Attending unlawful meeting	Whipping, twenty lashes	p. 197 (enacted Dec.17, 1792, ch. 103, § 14)
Lifting hand against white person	Whipping, no more than thirty lashes	p. 198 (enacted Dec. 17, 1792, ch. 103, § 14)
Giving of false testimony	The pillory, one hour; nailing of one ear; ear severed; repeat with other ear; whipping, thirty-nine lashes	p. 200 (enacted Dec. 17, 1792, ch. 103, § 17)

C. Infliction of Corporal Punishments at the End of the Eighteenth Century

Other bodily inflictions than those prescribed by the statutes cited above were sometimes used in the late eighteenth century.[1c] However, as the statutes reflect, the most

[1c] The "wooden horse," for example, was a straight, thin, horizontal pole which the culprit was set astride, sometimes with his legs weighted. Earle notes its inclusion in a sentence meted out at New Haven in 1787 (EARLE, CURIOUS PUNISHMENTS OF BYGONE DAYS (Reprint, 1969) [hereafter cited as EARLE], 131:

common of the corporal punishments (other than death) were whipping, the pillory, and minor mutilations, such as branding and the cropping or cutting off of ears.

Whipping was the great commonplace of penalties at the time of drafting and adoption of the Eighth Amendment: witness this accounting of the sentences imposed at a session of the Supreme Judicial Court of Massachusetts in Salem in 1786.

> "At the Supreme Judicial Court, holden in this town, for the county of Essex, which adjourned on Thursday last, several persons, criminally indicted, were convicted and severally sentenced. Isaac Coombs, an Indian, was found guilty, at last June term, at Ipswich, of murdering his wife; at which time a motion was made to the Court, in arrest of judgment, on which the Court suspended giving judgment thereon until this term; but the said motion being overruled, the Court gave judgment of death against him.
>
> "Besides the sentence of the Indian, as above, *Thomas Kendry*, for breaking into the store of Israel Bartlet, and stealing sundry goods, was sentenced, on his confession, to pay said Bartlet £33-9-6, to sit on the gallows one hour with a rope about his neck, to be whipped 30 stripes, and confined to hard labour on Castle-island two years.
>
> "*Thomas Atwood & John Ransum*, for breaking open the store of Knot Pedrick, and stealing dry fish, were each sentenced to pay said Pedrick £40-5-0, to sit one hour on the gallows, be whipped 36 stripes, and confined to labour on Castle-island 3 years.

"'Last Tuesday one James Brown, a transient person, was brought to the bar of the County Court on a complaint for horsestealing—being put to plead—plead guilty, and on Thursday received the sentence of the Court, that he shall be confined to the Goal in this County 8 weeks, to be whipped the first Day 15 stripes on the naked Body, and set an hour on the wooden horse, and on the first Monday each following Month be whipped ten stripes and set one hour each time on the wooden horse.'"

"*John Smith,* for stealing goods from Abner Perkinds, was sentenced to pay said Perkins £18-4-0, and be whipped 25 stripes.

"The same *John Smith,* for breaking open a sloop and stealing goods of John Brooks, was sentenced to pay said Brooks £16-8-0, to sit one hour on the gallows, be whipped 30 stripes, and confined 18 months on Castle-island.

"*John Scudder,* for stealing from Eli Gale, was sentenced to pay said Gale £5-2-0, or if unable to pay, to be disposed of by him, in service, to any person, for 2 months.[2c]

"*Joseph Ballard,* for stealing a horse from Thomas Dodge, was sentenced to pay £30, be whipped 20 stripes, pay costs, &c. and, if unable to pay, that said Dodge may dispose of him in service to any person for two years.

"*Calvin Newhall* was indicted for assaulting Deborah Sarker, a negro woman, with intent to commit a rape upon her. He pleaded not guilty; and the jury found him guilty of the assault, but whether with an intent to ravish they could not agree; whereupon the Attorney General would no further prosecute for said intent to ravish; and the Court ordered that said Calvin should be whipped 10 stripes, and recognize in £60, with sufficient surety in a like

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2c "It seems to have been quite common at one time to sell prisoners. At the Supreme Judicial Court in Salen, in November 1787, 'Elizabeth Leathe of Lynn, for harbouring thieves and receiving stolen goods, was convicted and sentenced to be whipped twenty stripes and to be sold for six months.' Also at a session of the same Court, held in Boston in September, 1791, six persons were convicted of theft and sentenced to be whipped and pay costs, or to be sold for periods of from six months to four years."

BROOKS, SOME STRANGE AND CURIOUS PUNISHMENTS (1886) [hereafter cited as BROOKS], 21-22.

sum, to be of good behaviour for 3 months, and pay costs."[3c]

The atmosphere of the whipping post is conveyed by these Boston scenes:

> "There was a whipping-post on Queen Street in Coston, another on the Common, another on State Street, and they were constantly in use in Boston in Revolutionary times. Samuel Breck wrote of the year 1771:
>
> "'The large whipping-post painted red stood conspicuously and prominently in the most public street in the town. It was placed in State Street directly under the windows of a great writing school which I frequented, and from there the scholars were indulged in the spectacle of all kinds of punishment suited to harden their hearts and brutalize their feelings. Here women were taken in a huge cage in which they were dragged on wheels from prison, and tied to the post with bare backs on which thirty or forty lashes were bestowed among the screams of the culprit and the uproar of the mob.'"

[3c]BROOKS 47-49. And see the following roster of sentences handed down at a session in Boston in 1784, *id.*, at 61-62:

> "At the Supreme Court held here on Thursday last, Direck Grout was tried for Burglary, and found guilty: sentence has not yet been passed upon him.
>
> "The following prisoners were also tried last week for various thefts, found guilty, and received sentence, viz.
>
> "Cornelius Arie, to be whipt 25 stripes, and set one hour on the gallows.
>
> "Thomas Joice, to be whipt 25 stripes, and branced.
>
> "William Scott, to be whipt 25 stripes, and set one hour on the gallows.
>
> "John Goodbread, and Edward Cooper, 15 stripes each.
>
> "James Campbell, to be whipt 30 stripes, and set one hour on the gallows.
>
> "Michael Tool, to be whipt 20 stripes.
>
> "Three notorious villains yet remain to be tried for burglary, and several others for theft."

"The diary of a Boston school-girl of twelve, little Anna Green Winslow, written the same year as Mr. Breck's account, gives a detailed account of the career of one Bet Smith, through workhouse and goal to whipping-post, and thence to be 'set on the gallows where she behaved with great impudence.'

"Criminals were sentenced in lots. On September 9, 1787, in one Boston court one burglar was sentenced to be hanged, five thieves to be whipped, two greater thieves to be set on the gallows, and one counterfeiter set on the pillory.

"Cowper's account of the tender-hearted beadle is supplemented by a similiar performance in Boston as shown in a Boston paper of August 11, 1789. Eleven culprits were to receive in one day the 'discipline of the post.' Another criminal was obtained by the Sheriff to inflict the punishment, but he persisted in being 'tender of strokes,' though ordered by the Sheriff to lay on. At last the Sheriff seized the whip and lashed the whipper, then turned to the row of ninepins and delivered the lashes. 'The citizens who were assembled complimented the Sheriff with three cheers for the manly determined manner in which he executed his duty.'"[4c]

The pillory "was an upright board, hinged or divisible in twain, with a hole in which the head was set fast, and usually with two openings also for the hands. Often the ears were nailed to the wood on either side of the head-hole."[5c] The following description of its place among the punishments of Newport indicates the nature of the penalty:

"'The public modes of punishment established by law were four, viz.: executions by hanging, whipping of men at the cart-tail, whipping of women in the jail-yard, and the elevation of counterfeiters and the like to a movable pillory, which turned on its base

[4c]EARLE 81-83.

[5c]EARLE 45-46.

so as to front north, south, east and west in succession, remaining at each point a quarter of an hour. During this execution of the majesty of the law the neck of the culprit was bent to a most uncomfortable curve, presenting a facial mark for those salutations of stale eggs which seemed to have been preserved for the occasion. The place selected for the infliction of this punishment was in front of the State House.'"[6c]

Penalties of mutilation apparently did not persist long after the turn of the nineteenth century in New England,[7c] but their use continued for several decades more in some areas of the country.[8c]

D. Banishment

Banishment is found infrequently upon the colonial statute books,[9c] but was used in practice in the Colonies and later in the States. Following English tradition, banishment was not principally a statutory matter in America.[10c]

[6c]EARLE 51-52.

[7c]One Hawkins had his ears cropped for forgery in Salem in 1801. EARLE 54; BROOKS 24.

[8c]Thompson, *Reforms in the Penal System of Tennessee*, 1 TENNESSEE HISTORICAL Q. 291, 294, 299 (1942).

[9c]See the Connecticut and Vermont provisions noted at pp. 1c, 14c *supra*. *Acts and Laws of the State of Connecticut in America*, printed by Elisha Babcock (Hartford, 1786) (1 vol.) p. 38; *Statutes of the State of Vermont, Revised and Established by Authority, in the year 1787, including those passed since that period until . . . January 1791*, printed by Anthony Haswell (Bennington, 1791) (1 vol.) p. 48.

[10c]In England, banishment can be traced to the Anglo-Saxon institutions of sanctuary and abjuration. See 3 HOLDSWORTH, HISTORY OF THE ENGLISH LAW (3d ed. 1903), 303-307. From the thirteenth century one who committed a crime could flee for refuge to a sanctuary. The coroner was then summoned to receive the criminal's confession. Upon taking an oath to adjure the kingdom, the criminal was allowed to proceed in safety to a port assigned to

Throughout the period prior to the middle of the last century, banishment was commonly imposed as a condition of executive pardons,[11c] and, less frequently, by specific

him. A large number of England's criminals voluntarily banished themselves in this manner rather than answer to the civil authorities for their crimes. See WHITE, LEGAL ANTIQUITIES (1913), 250. The procedure of sanctuary and abjuration was limited in the sixteenth century and finally abolished in 1623-1624. 3 HOLDSWORTH, *op. cit. supra*, at 306-307.

During the reign of Charles II, banishment began to be imposed through the device of conditional pardon. The King's pardoning power was extremely broad, and his right to impose conditions was unquestioned. See 6 *id.*, at 217-220. The original sentence could be revived upon a violation of the stipulations of its remission. The theory underlying a conditional pardon is similar to that of sanctuary and abjuration, and it would appear that the King's power to grant such pardons was a continuous development from the institutions of sanctuary and abjuration. Note, *Banishment—A Medieval Tactic in Modern Criminal Law*, 5 UTAH L. REV. 365, 368 (1957).

Before the abolition of sanctuary and abjuration, England had begun to transport criminals to penal colonies. Exile, or transportation, as the punishment was known, was first introduced by statute at the end of the seventeenth century. 2 HAWKINS, PLEAS OF THE CROWN (8th ed. 1824), 508. During the period of American colonization, this practice was adopted on a large scale. "After the establishment of English colonies in America, . . . it [transportation] became in this country . . . the most common sentence of criminals." *Ibid.*

Another form of statutory banishment had English roots. Beginning in the fourteenth century, Parliament passed bills of attainder, punishing persons by exile or death. See *Clarendon's Case*, 6 Howell St. Trials (Eng.) 291 (1667). CHAFEE, THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787 (1956), 117.

Thus banishment was a complex institution in English law, imposed sometimes under general statutes, sometimes by particular bills, and sometimes in the exercise of the royal prerogative without statutory authorization.

[11c]See *People v. Potter*, 1 Parker Crim. Rep. 47, 56-57 (N.Y., Sup. Ct. 1846); *State v. Fuller*, 1 McCord 178 (S.C. 1821); *People v. Smith*, 1 Bailey 283 (S.C. 1829). The *Potter* opinion specifically traces the governor's power to pardon with banishment to the English tradition of sanctuary and abjuration, (1 Parker Crim. Rep., at 54), and sustains it by reference to settled usage. "[T]he governor may grant a pardon on a condition which does not subject the prisoner to an

legislative acts.[12c] These practices are found from the birth of the colonies[13c] through the constitutional period.[14c]

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unusual or cruel punishment. Banishment is neither. It is sanctioned by authority, and has been inflicted, in this form, from the foundation of our government (*Smith's Case*, 1 *Bailey, supra; James's Case*, 2 *Caines*, 57; *Pease's Case, in the Court of Errors*, 3 *John Ca.* 333; 2 Bailey, 516; 1 McCord, 178)." *Id.* at 56-57

[12c]In this Court, *Cooper v. Telfair*, 4 Dall. 314 (1800), upheld a banishment by the Georgia Legislature. The legislature had passed an act in 1782 banishing the plaintiff in error from the State and confiscating his property. Justice Patterson's opinion states that "the power of confiscation and banishment . . . is a power that grows out of the social compact, which must reside somewhere, and which is so inherent in the legislature that it cannot be divested or transferred, without an express provision of the constitution." *Id.* at 316. Justice Cushing adds: "The right to confiscate and banish, in the case of an offending citizen, must belong to every government." *Ibid.*

[13c]Banishment was employed as a punishment in America as early as 1636, when Anne Hutchinson was ". . . banished from out of our jurisdiction as being a woman not fit for our society." DOUGLAS, AN ALMANAC OF LIBERTY (1954), 135.

[14c]See note 11c *supra.*

APPENDIX D

SYNOPSIS OF THE CONSTITUTIONAL HISTORY OF THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE OF THE EIGHTH AMENDMENT.

A. English Antecedents

The early English development of prohibitions against xcessive punishment, prior to and following Magna Carta,[1d] re canvassed in a recent article and need not be rehashed ere. Granucci, *"Nor Cruel and Unusual Punishments nflicted:" The Original Meaning*, 57 CALIF. L. REV. 839, 44-847 (1969) [hereafter cited as Granucci].

The first use of the phrase "cruel and unusual punishments" in English law appears in the Declaration of Rights nd the Bill of Rights of 1689.[2d] They recite, among the llegal acts committed by James II, that "excessive fines ave been imposed; and illegal and cruel punishments nflicted," and "for vindicating and asserting their ancient ights and liberties, declare . . . That excessive bail ought ot to be required nor excessive fines imposed nor cruel nd unusual punishment inflicted."[3d]

[1d]MAGNA CARTA, chs. 20-22 (1215).

[2d]The Declaration was proposed by a "convention" of the estates f the realm which met following the flight of James II. It was preented to William and Mary when they were tendered the crown and he new King and Queen assented to it. The bill was enacted shortly hereafter by the Convention Parliament and is identical to the eclaration but for the inclusion of some additional matter not relent here. MAITLAND, THE CONSTITUTIONAL HISTORY OF NGLAND (1913), 283-284; 3 HALLAM, CONSTITUTIONAL HISORY OF ENGLAND (Harper & Brothers ed. 1859), 547-549.

[3d]1 William and Mary, sess. 2, ch. 2, preamble, clause 10, printed ADAMS & STEPHENS, SELECT DOCUMENTS OF ENGLISH ONSTITUTIONAL HISTORY (1926), 462-465.

B. Developments in America

1. *Pre-Revolutionary Times*

A statute of the Massachusetts Colony predating the Declaration and Bill of Rights contains a prohibition on the use of cruel modes of punishment. Drafted by the Rev. Nathaniel Ward, a Puritan attorney and minister, the "Body of Liberties" was enacted in 1641 by the General Court.[4d] Clause 46 of the document reads: "For bodilie punishments we allow amongst us none that are inhumane Barbarous or cruel."[5d]

2. *State Constitutions 1776-1790*

Beginning in Virginia in early 1776, and continuing in rapid succession after the Declaration of Independence, constitutions were promulgated in all of the former thirteen colonies. Nine of these included prohibitions against cruel and unusual punishments, in general modeled closely after the formulation in the English Bill of Rights, but in some cases with additions.

George Mason's draft of the Constitution of Virginia with its Declaration of Rights was adopted, with minor changes, on June 12, 1776. Section 9 of the Declaration provides: "That excessive bail ought not to be required nor excessive fines imposed, nor cruel and unusual punishments inflicted,"[6d] a verbatim copy of the prohibition in the English Bill of Rights. In short order, like provisions were incorporated in

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[4d]WHITMORE, COLONIAL LAWS OF MASSACHUSETTS 1660-1672 (1889), 8. It has been suggested that Ward's proposal in this regard was derived from the earlier work of Sir Robert Beale in England. Granucci 848-851.

[5d]PERRY, SOURCES OF OUR LIBERTIES (1959), 153.

[6d]Virginia Constitution of 1776, Declaration of Rights, ¶9, 7 THORPE, FEDERAL AND STATE CONSTITUTIONS (1909), 3813 [hereafter cited as THORPE].

the new constitution of Delaware,[7d] North Carolina,[8d] Maryland,[9d] Pennsylvania,[10d] South Carolina,[11d] and Massachusetts.[12d] The South Carolina Constitution of 1778 included a directive to the legislature to reform the penal code so that punishments may be made "less sanguinary, and in general more proportionate to the crime."[13d] The New Hampshire Constitution, not adopted until 1784, also contained in addition to the then standard cruel and unusual punishment clause[14d] a lengthy statement on the importance of proportioning penalties and enacting humane penal laws.[15d] Vermont, which did not include a "cruel and

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[7d]Delaware Declaration of Rights of 1776, § 16, 1 DEL. CODE ANN. (1953), 83.

[8d]North Carolina Constitution of 1776, § 10, 5 THORPE 2788.

[9d]Maryland Constitution of 1776, § 22, 3 THORPE 1688; see also *id.* § 14: "That sanguinary laws ought to be avoided, as far as is consistent with the safety of the state: and no law, to inflict cruel and unusual pains and penalties, ought to be made in any case, or at any time hereafter."

[10d]Pennsylvania Constitution of 1790, Art. 9, § 13, 5 THORPE 3101: "... nor cruel punishments inflicted."

[11d]South Carolina Constitution of 1790, Art. 9, § 4, 6 THORPE 3264: "... nor cruel punishments inflicted."

[12d]Massachusetts Constitution of 1780, Art. 26, 3 THORPE 1892.

[13d]South Carolina Constitution of 1778, § 40, 6 THORPE 3257.

[14d]New Hampshire Constitution of 1784, § 33, 4 THORPE 2457.

[15d]*Id.*, § 18, 4 THORPE 2456: "All penalties ought to be proportioned to the nature of the offence. No wise legislature will affix the same punishment to the crimes of theft, forgery and the like, which they do to those of murder and treason; where the same undistinguishing severity is exerted against all offences, the people are led to forget the real distinction in the crimes themselves, and to commit the most flagrant with as little compunction as they do those of the lightest dye: For the same reason a multitude of sanguinary laws is both impolitic and unjust. The true design of all punishments being to reform, not to exterminate, mankind."

unusual punishment" prohibition, did direct the development of prisons in order to permit lesser reliance on sanguinary punishments.[16d]

3. *The Federal Constitution*

Although the Articles of Confederation contained no provisions for the protection of individual liberties, the Northwest Ordinance, enacted by the Confederate Congress in 1787, did provide such guarantees for the citizens of the Northwest Territory, and included a prohibition of cruel and unusual punishments.[17d]

The Federal Constitution proposed in 1787 contained no bill of rights, of course, and this omission was the subject of well-known discussions in the ratifying conventions of the States. Three of the States in which the strongest sentiments was expressed of the need for the addition to the Constitution of a body of protections of individual liberties–Virginia,[18d] New York,[19d] and North Carolina[20d]–submitted proposals for specific bill of rights guarantees which included

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[16d]Vermont Constitution of 1777, Chap. 2, Sec. 35, 6 THORPE 3747: "To deter more effectually from the commission of crimes, by continued visible punishment of long duration, and to make sanguinary punishments less necessary; houses ought to be provided for punishing, by hard labor, those who shall be convicted of crimes not capital...."

[17d]Ordinance of 1787: The Northwest Territorial Government, The Confederate Congress, July 13, 1787; Art. II: "All fines shall be moderate; and no cruel or unusual punishments shall be inflicted." 1 U.S.C. (1964), xxxvii, xxxviii.

[18d]See 3 ELLIOT'S DEBATES (2d ed. 1863), 593-596, 612-613, 622-631, 649-652.

[19d]1 ELLIOT'S DEBATES (2d ed. 1863), 329.

[20d]4 ELLIOT'S DEBATES (2d ed. 1863), 242.

bitions of the imposition of cruel and unusual punish-
.[21d]

e debates in two of the state conventions specifically
ed to the absence of such a clause in the original Con-
ion. In Massachusetts, Mr. Holmes stated:

> "What gives an additional glare of horror to these gloomy circumstances is the consideration, that Congress have to ascertain, point out, and determine, what kind of punishments shall be inflicted on persons convicted of crimes. They are nowhere restrained from inventing the most cruel and unheard-of punishments, and annexing them to crimes; and there is no constitutional check on them, but that *racks* and *gibbets* may be amongst the most mild instruments of their discipline."[22d]

the Virginia Convention, a colloquy among Patrick
, George Nicholas and George Mason touched on the
:

> Henry: "Congress, from their general powers, may fully go into business of human legislation. They may legislate, in criminal cases, from treason to the lowest offence—petty larcency. They may define crimes and prescribe punishments. In the definition of crimes, I trust they will be directed by what wise representatives ought to be governed by. But when we come to punishments, no latitude ought to be left, nor dependence put on the virtue of representatives. What says our bill of rights?—'that excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.' Are you not, therefore, now calling on those gentlemen who are to compose Congress, to prescribe trials and define punishments without this control? Will they find sentiments there

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ELLIOT'S DEBATES (2d ed. 1863), 658 (Virginia); 1 *id.* lew York); 4 *id.* 244 (North Carolina).

ELLIOT'S DEBATES (2d ed. 1863), 111.

similar to this bill of rights? You let them loose; you do more–you depart from the genius of your country."

• • • • •

"In this business of legislation, your members of Congress will loose the restriction of not imposing excessive fines, demanding excessive bail, and inflicting cruel and unusual punishments. These are prohibited by your declaration of rights. What has distinguished our ancestors? –That they would not admit of tortures, or cruel and barbarous punishment. But Congress may introduce the practice of the civil law, in preference to that of the common law. They may introduce the practice of France, Spain, and Germany–of torturing, to extort a confession of the crime. They will say that they might as well draw examples from those countries as from Great Britain, and they will tell you that there is such a necessity of strengthening the arm of government, that they must have a criminal equity, and extort confession by torture, in order to punish with still more relentless severity. We are then lost and undone."[23d]

Nicholas: "But the gentlemen says that, by this Constitution, they have the power to make laws to define crimes and prescribe punishments; and that consequently, we are not free from torture. . . . If we had no security against torture but our declaration of rights, we might be tortured to-morrow; for it has been repeatedly infringed and disregarded."[24d]

"Mr. GEORGE MASON replied that the worthy gentleman was mistaken in his assertion that the bill of rights did not prohibit torture; for that one clause expressly provided that no man can give evidence against himself; and that the worthy gentleman must know that, in those countries where torture is used, evidence was extorted from the criminal himself.

[23d]3 ELLIOT'S DEBATES (2d ed. 1863), 447-48.

[24d]3 *id.* at 451.

Another clause of the bill of rights provided that no cruel and unusual punishments shall be inflicted; therefore, torture was included in the prohibition.

"Mr. NICHOLAS acknowledged the bill of rights to contain that prohibition, and that the gentleman was right with respect to the practice of extorting confession from the criminal in those countries where torture is used; but still he saw no security arising from the bill of rights as separate from the Constitution, for that it had been frequently violated with impunity."[25d]

In the debates of the first Congress on the Bill of Rights, there was very little discussion of the provision which has become the Eighth Amendment, and that only in the House of Representatives. Here is the whole of it:

"Mr. Smith, of South Carolina, objected to the words 'nor cruel and unusual punishments,' the import of them being too indefinite."

"Mr. Livermore: 'The clause seems to express a great deal of humanity, on which account I have no objection to it; but as it seems to have no meaning in it, I do not think it necessary. What is meant by the terms excessive bail? Who are to be the judges? What is understood by excessive fines? It lies with the court to determine. No cruel and unusual punishment is to be inflicted; it is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we in the future to be prevented from inflicting these punishments because they are cruel? If a more lenient mode of correcting vice and deterring others from the commission of it would be invented, it would be very prudent in the Legislature to adopt it; but until we have some security that this will be done, we ought not to be restrained from making necessary laws by any declaration of this kind.'

[25d] 3 *Id.* at 452.

"The question was put on the clause, and it was agreed to by a considerable majority."[26d]

Examination of the debates in the state legislatures concerning the ratification of the Bill of Rights has revealed no extant reference to the Clause.

[26d] 1 Annals of Congress (1789), 754 (1st Congress, 1st Session).

APPENDIX E

WORLDWIDE AND NATIONAL TRENDS IN THE USE OF THE DEATH PENALTY

In a report for the United Nations Department of Economic and Social Affairs describing developments in the use of the death penalty during the years 1961 to 1965, Professor Norval Morris summarized his findings as follows:

> ". . . There is an over-all tendency in the world towards fewer executions. This is the result of less frequent use of the death penalty in those States whose statutes provide for that penalty, and of a steady movement towards legislative abolition of capital punishment." [1e]

In a 1971 supplemental report to the Economic and Social Council, the Secretary-General of the United Nations concluded:

> ". . . There is still a clear trend towards total abolition. Most countries are gradually restricting the number of offences for which the death penalty can be applied and a few have totally abolished capital offences even in wartime. Those countries retaining the death penalty report that in practice it is only exceptionally applied and frequently the persons condemned are later pardoned by executive authority. . . ." [2e]

A variety of factors hamper somewhat any attempt to generalize upon the data summarized by these statements. No study has successfully sought data from all jurisdictions competent to retain or abolish capital punishment; many

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[1e]UNITED NATIONS, DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, CAPITAL PUNISHMENT (ST/SOA/SD/9-10) (1968) [hereafter cited as UNITED NATIONS], 81-82.

[2e]UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, Note by the Secretary-General, *Capital Punishment*, (E/4947) (February 23, 1971) [hereafter cited as Secretary-General's Note], p. 3.

otherwise abolitionist jurisdiction retain the death penalty for extraordinary offenses or emergency circumstances; several jurisdictions have failed to reflect *de facto* abolition in positive law.[3e] A consideration of trends over the last two centuries, moreover, is complicated by the movements of several jurisdictions which have abolished the death penalty and subsequently reintroduced it.

Nonetheless, when these vacillating movements are put out of account by focusing upon countries which have abolished capital punishment and never restored it (and when "abolition" is used to mean the termination of capital punishment for the ordinary violent civilian crimes: murder, rape, robbery, arson, and kidnapping), definite historical trends are clearly apparent.

Table I lists abolitionist jurisdictions outside the United States by year of *de jure* abolition, except for Lichtenstein, Luxembourg, Nicaragua, and Surinam, for which the last execution year is given to mark the beginning of *de facto* abolition.[4e]

[3e]See UNITED NATIONS 8-9; Patrick, *The Status of Capital Punishment: A World Perspective*, 56 J. CRIM. L., CRIM & POL. SCI. 397, 405 (1965) [hereafter cited as Patrick].

[4e]Nine of the listed jurisdictions retain execution as the penalty for certain extraordinary civil offenses (the four Australian jurisdictions, Canada, Israel, Nepal, New Zealand, and United Kingdom); eight permit the death penalty in wartime or under military law (Brazil, Denmark, Finland, Italy, Netherlands, Norway, Sweden and Switzerland); and two executed Nazi collaborators after World War II (Netherlands and Norway).

TABLE I[5e]

Worldwide Abolition

ARGENTINA	1922	LICHTENSTEIN	1798[7e]
AUSTRALIA (Federal)	1945	LUXEMBOURG	1821[7e 9e]
New South Wales	1955	MEXICO (Federal)	1931
Queensland	1922	29 of 32 States	1931-1970
Tasmania	1968	MONACO	1962
AUSTRIA	1968	MOZAMBIQUE	1867
BELGIUM	1863[6e]	NEPAL	1950
BOLIVIA	1961	NETHERLANDS	1886
BRAZIL	1946	Antilles	1957
CANADA	1967[8e]	NEW ZEALAND	1961
COLUMBIA	1910	NICARAGUA	1892[7e]
COSTA RICA	1880	NORWAY	1905
DENMARK	1930	PANAMA	1915
DOMINICAN REPUBLIC	1924	PORTUGAL	1867
ECUADOR	1897	SAN MARINO	1848
FINLAND	1949	SURINAM	1927[7e]
GERMANY, West	1949	SWEDEN	1921
GREENLAND	1954	SWITZERLAND	1942
HONDURAS	1957	UNITED KINGDOM	
ICELAND	1940	Great Britain	1965
INDIA		Northern Ireland	1966
Travencore	1944	URUGUAY	1907
ISRAEL	1954	VATICAN CITY STATE	1969
ITALY	1944	VENEZUELA	1863

[5e]Sources for this table are: UNITED NATIONS; Secretary-General's Note; ANCEL, THE DEATH PENALTY IN EUROPEAN COUNTRIES (Council of Europe, European Committee on Crime Problems, 1962); JOYCE, CAPITAL PUNISHMENT: A WORLD VIEW (1961); UNIVERSITY OF COIMBRA, FACULTY OF LAW, PANA DE MORTE (1967); Patrick.

[6e]Excludes one soldier executed in 1918.

[7e]*De facto* only; date is last execution.

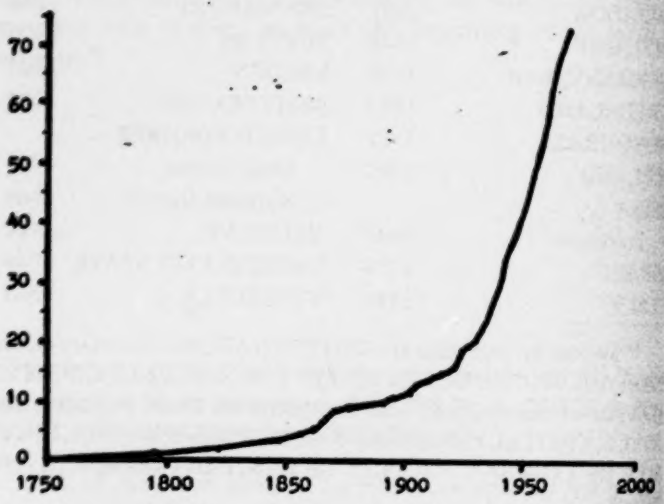
[8e]Statute abolishing capital punishment for murder expires after a five-year period (beginning 1967) if not renewed.

[9e]Excludes one.

Chart I displays the data contained in Table I. Although, as of 1970, abolitionist jurisdictions comprise far less than half of all the nations of the world, there is evident a definite, continuing, long-term, accelerating, worldwide trend toward ending the use of the penalty of death. Every decade since 1800 has shown growth in the total number of abolitionist jurisdictions; and during the past century the number of jurisdictions abandoning capital punishment in any given decade has been greater than the number in the preceding decade.

CHART I

Worldwide Abolition Graph



A similar trend is apparent within the United States. Table II lists by date of *de jure* abolition those States which are presently abolitionist.

TABLE II[10e]

Abolition in the United States

ALASKA	1957	NORTH DAKOTA	1915[14e]
HAWAII	1957	OREGON	1964
IOWA	1965	PUERTO RICO	1929
MAINE	1887	RHODE ISLAND	1852[15e]
MICHIGAN	1847[11e]	VERMONT	1965[12e]
MINNESOTA	1911	VIRGIN ISLANDS	1957
NEW MEXICO	1969[12e]	WEST VIRGINIA	1965
NEW YORK	1965[13e]	WISCONSIN	1853

The information in Table II is exhibited by the solid line on Chart II. Unlike the situation outside the United States, jurisdictions which have reinstated capital punishment after periods of abolition substantially affect the curve: the broken line on Chart II includes eight States now having the death penalty which underwent periods of abolition,[16e]

[10e]Sources for this table are: Appendix G to this brief; UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, NATIONAL PRISONER STATISTICS, Bulletin No. 45, *Capital Punishment* 1930-1968 (August 1969), p. 30; 34 LAWS OF PUERTO RICO ANN., § 995 (1956); VIRGIN ISLANDS CODE ANN., tit. 14, 923 (1964).

[11e]Death penalty retained for treason until 1963.

[12e]Death penalty retained for murder of police officer or prison guard, or for commission of second unrelated murder.

[13e]Death penalty retianed for murder of police officer and for any homicide by life-term prisoner.

[14e]Death penalty retained for treason and for murder by life-term prisoner incarcerated for murder.

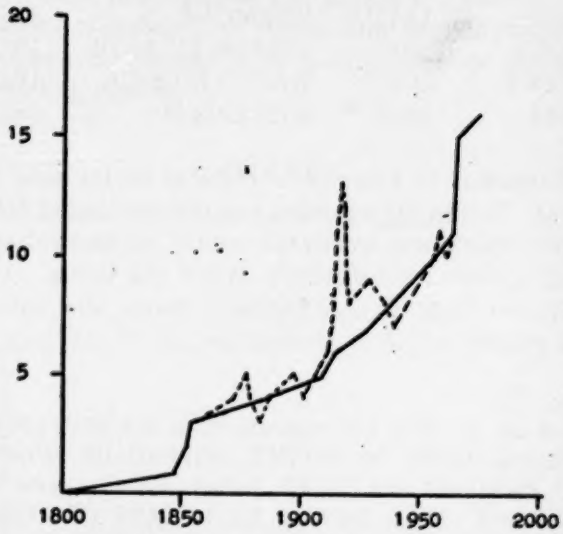
[15e]Death penalty retained for murder by life-term prisoner.

[16e]Arizona (1916-1918); Colorado (1897-1901); Delaware (1958-1961); Kansas (1907-1935); Missouri (1917-1919); South Dakota (1915-1939); Tennessee (1916-1918); Washington (1912-1919).

as well as three presently abolitionist States which had earlier periods of abolition than those shown in Table II.[17e]

CHART II

United States Abolition Graph



Although short-lived periods of abolition in five States in the decade preceding Prohibition[18e] blur the impact of the otherwise definitive trend reflected in Chart II, that trend is compellingly reflected in the number of executions per year as shown by Chart III. Chart III displays the information contained in the Table on p. 37 of the body of this brief, and demonstrates the solidity of the conclusion that "while de jure abolition has ebbed and flowed a de facto abolition has practically become a reality in the United

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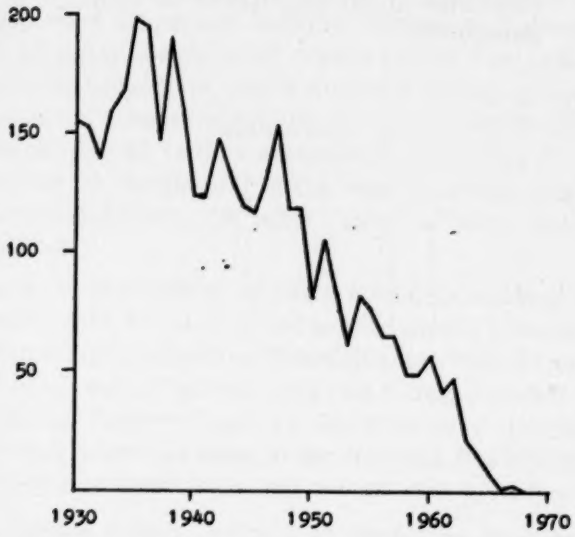
[17e] Iowa (1872-1878); Maine (1876-1883); Oregon (1914-1920).

[18e] Arizona, Missouri, Oregon, Tennessee and Washington. See notes 14e, 15e *supra*.

States."[19e] This is a Chart of the number of men actually executed yearly since 1930.

CHART III

Executions in the United States
1930-1970



In summary:

(1) Among Western European countries outside the Soviet orbit, only France and Spain still authorize the death penalty for murder and other felonies in peacetime.

(2) In the Western Hemisphere, the United States stands virtually alone in using the death penalty. In North America, out of 98 jurisdictions (12 in Canada, 32 in Mexico, and 54 in the United States), 38 of the 41 which allow capital punishment for first degree murder generally are in the United States.

[19e]2 NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS (G.P.O. 1970), 1350-1351.

(3) In the Anglo-American world (United Kingdom, Canada, Australia, United States), whose jurisprudence is rooted in a common experience several centuries old, the death penalty for crimes such as murder, rape, and kidnapping is all but abolished outside the United States. Except for the 38 jurisdictions which retain the death penalty in this country, only the Republic of Ireland and four Australian states have failed to abandon capital punishment.

APPENDIX F

AVAILABLE INFORMATION RELATING TO THE PROPORTION OF PERSONS ACTUALLY SENTENCED TO DEATH AMONG THOSE CONVICTED OF CAPITAL CRIMES.

It is exceptionally difficult to obtain information which ll permit construction of a reliable estimate concerning e proportion of persons actually sentenced to death,[1f] ong all those convicted of capital crimes. In order to lculate this proportion, two comparable figures are required: e number of persons convicted of a given capital offense, d the number of persons sentenced to death for it. The ures must be *comparable* in the sense that they relate to e same jurisdiction, the same period of time, and the ne offense.

Figures for the number of death sentences imposed dur- recent years, for each of the several capital offenses, in h of the capital-punishment jurisdictions, may be esti- ted—albeit somewhat inexactly—from data reported in National Prisoner Statistics Bulletins on *Executions.* e relevant tables are cited in the footnote,[2f] which also s forth the citation form that will be used hereafter to

[1f] By "persons actually sentenced to death," we mean persons n whom the sentencing authority, judge or jury, imposes a death ence. We do not mean to take account of later judicial decisions ting the sentence, of executive clemency, or of any other factor may result in the initial death sentence not being carried out.

[2f] The National Prisoner Statistics Bulletins on *Executions* are ished annually. The latest is UNITED STATES DEPARTMENT JUSTICE, BUREAU OF PRISONS, NATIONAL PRISONER STA- TICS, No. 45, *Capital Punishment* 1930-1968 (August, 1969). In columns below we list the numbers and titles of the issues relied in this Appendix, the abbreviation which will hereafter be used signate each, and the pages and tables of each that contain perti- information.

ber, title, date	Abbreviation	Page and table
28, Executions (April, 1962)	NPS (1961)	p. unnumbered table 5

describe each bulletin. There are several problems with th tables as sources of information relating to the number of persons sentenced to death. First, the figure which they report represents the number of persons received by the respective state penitentiaries from the court, each year, under sentence of death. This may be fewer than the actual number of death sentences imposed in some states, where the practice is to hold a death-sentenced man in a local facility pending post-verdict motions and/or appeals. Second, for this or other reasons, a few death sentences imposed each year are not reported to the NPS until the following year. The latest NPS Bulletin gives revised figur for prisoners received from court under sentence of death for each year since 1961 (NPS (1968), p. 12, table 4); but these figures are not broken down by jurisdiction and offense. Figures broken down by jurisdiction and offense must be taken from the earlier annual reports, and have no been revised.

But these problems are inconsequential compared to thos of ascertaining comparable figures relating to the number o convictions for capital offenses. Conviction figures are almost nowhere published. The rare published figures suff from assorted woes that virtually destroy their usefulness.

No. 32, Executions 1962 (April, 1963)	NPS (1962)	p. unnumbered, table 5
No. 34, Executions 1930-1963 (May, 1964)	NPS (1963)	p. 14, table 5
No. 37, Executions 1930-1964 (April, 1964 [sic: 1965])	NPS (1964)	p. 14, table 4
No. 39, Executions 1930-1965 (June, 1966)	NPS (1965)	p. 14, table 4
No. 41, Executions 1930-1966 (April, 1967)	NPS (1966)	p. 13, table 4
No. 42, Executions 1930-1967 (June 1968)	NPS (1967)	pp. 12-17, tables 4-7
No. 45, Capital Punishment 1930-1968 (August, 1969)	NPS (1968)	pp. 12-17, tables 4-7

Some states report judicial statistics for fiscal years, making comparison with the calendar-year NPS reports difficult Most states report conviction figures for categories of cases ("murder"; "sexual offenses") that include, but are not entirely composed of, capital crimes. Many states report not conviction figures, but figures concerning the number of commitments to the state penitentiary under conviction and sentence for given offenses. These figures omit large numbers of convicted persons: namely, those sentenced to imprisonment in local facilities, or to probation, or whose sentences are suspended. Secondary sources reporting conviction figures suffer from the same defects and often, in addition, they report totals for a span of years that includes both a period of mandatory capital sentencing and a succeeding period of discretionary capital sentencing within a jurisdiction.

Confronted with these problems, we adopt the approach of setting out below all of the information we can find relating to the question of what proportion among all convicted capital offenders are actually sentenced to death. The information comes from a variety of problems. We report each item separately, and explain its problems as we see them. The information below relates to the two capital offenses principally in use in the United States: murder and rape. Information on other capital offenses is not obtainable in intelligible form.

A. Murder

1. In the federal courts, first degree murder is capitally punishable under 18 U.S.C. §1111 (1964). For all federal district courts (excluding the District of Columbia, Canal Zone, Guam and the Virgin Islands), there appear to have been a total of 25 convictions for this offense between July 1, 1961 and June 30, 1969, excluding the fiscal year 1964-1965, for which no figure is reported. During the calendar years 1961 through 1969, 2 death sentences were imposed by federal courts for murder. Note that the death-sentence

figure relates to a period of nine years, including the seven for which the conviction figure is given. This awkard form of comparison is necessitated by the problem of relating calendar to fiscal years. Conviction figures are taken from table D5 in the Annual Reports of the Director of the Administrative Office of the United States Courts for the years 1962-1969; death-sentence figures from NPS (1961) through NPS (1968).[3f]

2. It appears that in the five calendar years 1966 through 1970, 42 persons were sentenced upon conviction of first degree murder in the United States District Court for the District of Columbia. During this period one person was sentenced to die for murder. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, DIVISION OF PROCEDURAL STUDIES AND STATISTICS, NUMBER OF PERSONS SENTENCED FOR CRIMES WHICH INCLUDE THE DEATH SENTENCE AS A PENALTY SECTION: FISCAL YEARS 1966-1970 (unpublished Report, August 10, 1971).

3. Writing in 1964, the former Director of the California Department of Corrections estimated that one-fifth of California's first-degree murder convicts were sentenced to death. McGee, *Capital Punishment as Seen by a Correctional Administrator*, 28 FED. PROBATION (No. 2) 11, 12 (1964). The Bureau of Criminal Statistics reports 88 first degree murder convictions during 1967, as compared with 17 death sentences. STATE OF CALIFORNIA, DEPARTMENT OF JUSTICE, DIVISION OF LAW ENFORCEMENT, BUREAU OF CRIMINAL STATISTICS, REPORT (CRIME AND DELINQUENCY IN CALIFORNIA, 1967) (1968) 140; NPS (1967). During 1969, there were 87 first-degree murder

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[3f]The last published figures for death sentences cover the period through December 31, 1968. Our information that no federal death sentences were imposed for murder during calendar year 1969 is based upon a communication from James A. McCafferty, Assistant Chief, Division of Procedural Studies and Statistics, Administrative Office of the United States Courts, August 11, 1971.

convictions, and 8 death sentences. STATE OF CALIFORNIA, DEPARTMENT OF JUSTICE, DIVISION OF LAW ENFORCEMENT, BUREAU OF CRIMINAL STATISTICS, REPORT (CRIME AND DELINQUENCY IN CALIFORNIA, 1969) (1970) 121. For other recent years, we are unable to discover published reports of the number of first-degree murder convictions, since the conviction figure is stated for homicide generically.

4. There appear to have been 78 commitments under conviction for first degree murder in Florida between July 1, 1964 and June 30, 1966. During the three calendar years encompassing these two fiscal years, 16 men were sentenced to die for first degree murder. FLORIDA DIVISION OF CORRECTIONS, FIFTH BIENNIAL REPORT (July 1, 1964-June 30, 1966) (1966) 74-75; NPS (1964); *id.* (1965); *id.* (1966). For the period between July 1, 1966 and June 30, 1970, there were 164 life sentences and 29 death sentences imposed for first degree murder in Florida. FLORIDA DIVISION OF CORRECTIONS, SEVENTH BIENNIAL REPORT (July 1, 1968 to June 30, 1970) (1970) 82; *id.*, SIXTH BIENNIAL REPORT (July 1, 1966 to June 30, 1968) (1968) 77.

5. There appear to have been 424 commitments under conviction for murder in Georgia between July 1, 1964 and December 31, 1968. During the five calendar years encompassing these four and a half fiscal years, 14 men were sentenced to die for murder. (During these years all murder was capital in Georgia, which recognized no degrees of the offense.) STATE OF GEORGIA BOARD OF CORRECTIONS, ANNUAL REPORT (July 1, 1964-June 30, 1965) (1965) 56; *id.* (July 1, 1965-June 30, 1966) (1966) 52; *id.* (July 1, 1966-June 30, 1967) (1967) 39; *id.* (July 1, 1967-June 30, 1968) (1968) 45; *id.* (July 1, 1968-June 30, 1969) (1969) 101; NPS (1964); *id.* (1965); *id.* (1966); *id.* (1967); *id.* (1968).

6. There appear to have been 28 commitments under conviction for first degree murder in Maryland between

July 1, 1965 and June 30, 1966. During the two calenda years encompassing that one fiscal year, 4 men were sentenced to die for first degree murder. MARYLAND DEPARTMENT OF CORRECTION, FORTIETH REPORT (July 1, 1965-June 30, 1966) (1966) 36; NPS (1965); *id.* (1966). Again between July 1, 1967 and June 30, 1968, there were 28 first degree murder commitments. During the two calendar years encompassing that fiscal year, 3 m were sentenced to die for first degree murder. MARYLAND DEPARTMENT OF CORRECTIONAL SERVICES, FORT SECOND REPORT (July 1, 1967-June 30, 1969) (1969), unpaginated; NPS (1967); *id.* (1968).

7. Bedau reports that in New Jersey, between 1916 an 1955, 497 persons were committed to the state penitentiar with life sentences for murder, while 157 persons were sentenced to death for murder. (These are all first degree cases, it would appear, since New Jersey law does not permit life imprisonment for second degree murder. The death penalty for first degree murder was made discretionary in 1916.) The problem here is that the figures for conviction include both jury convictions (entailing jury discretion to sentence to life or death) and court convictions upon a plea of *non vult* (which, under New Jersey law throughout the period, precluded the death penalty). Bedau, *Death Sentences in New Jersey 1907-1960*, 19 RUTGERS L. REV. 1, 30 (1964) Between 1956 and 1960 in New Jersey, Bedau finds 61 first degree murder convictions, resulting in 13 death sentences and 48 life sentences (17 on a jury verdict and 31 on a plea of *non vult*). *Id.* at 51.[4f] These figures may relate only to male convicts, since Bedau received his conviction figures from Edwin Wolf (see next paragraph), who studied the prison records of convicted male offenders.

Wolf reports that of 159 convictions by a jury of a mal offender for the offense of first degree murder in New Jer-

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[4f]The figure "60" in the lower right-hand cell of table XXVII ought to be "61." This is so because the figure "4" in the last colum for the year 1958 is a typographical error and should read "5."

sey between 1937 and 1961, 62 resulted in a death sentence and 97 in a sentence of life imprisonment. Wolf, *Abstract of Analysis of Jury Sentencing in Capital Cases: New Jersey: 1937-1961*, 19 RUTGERS L. REV. 56, 60 (1964).

8. Johnson reports that in North Carolina, between July 1, 1938 and December 31, 1953, there were 742 convictions for first degree murder, as compared with 162 death sentences (admissions to death row) upon conviction for first degree murder. Johnson, *Selective Factors in Capital Punishment*, 36 SOCIAL FORCES 165, 166 (1957).

9. It appears that in Ohio there were 183 convictions for first degree murder during the calendar years 1965-1968. In this same period 32 men were sentenced to die for first degree murder. OHIO DEPARTMENT OF MENTAL HYGIENE AND CORRECTION, OHIO JUDICIAL CRIMINAL STATISTICS (1965) 13; *id.* (1966) 11; *id.* (1967) 11; *id.* (1968) 13; NPS (1965); *id.* (1966); *id.* (1967); *id.* (1968).

10. Wolfgang reports that in Philadelphia, Pennsylvania during the period 1948-1952 there were 77 convictions of first degree murder, as compared with 7 death sentences. WOLFGANG, PATTERNS IN CRIMINAL HOMICIDE (Science ed., Wiley, 1966) 305-306, table 36.

11. It appears that there were 71 commitments under conviction for first degree murder in Tennessee during fiscal years July 1, 1965-June 30, 1968. During the four calendar years encompassing these three fiscal years one man in Tennessee was sentenced to die for first degree murder. TENNESSEE DEPARTMENT OF CORRECTION, DEPARTMENTAL REPORT (1965-1966, 1966-1967) (1968) pages unnumbered; *id.* (PERIOD ENDING JUNE 30, 1969) (1969) pages unnumbered; NPS (1965); *id.* (1966); *id.* (1967); *id.* (1968).

12. It appears that during calendar years 1946 through 1968, 5034 persons were committed under sentence for murder in Texas. (Texas has no degrees of murder.) During this period, 139 persons were sentenced to die for mur-

der. Koeninger, *Capital Punishment in Texas, 1924-1968*, 15 CRIME & DELINQUENCY 132, 135 (1969); TEXAS DEPARTMENT OF CORRECTIONS, BUREAU OF RECORDS AND IDENTIFICATION, ANNUAL STATISTICAL REPORT, 1968 (1969), unpaginated; NPS (1968).

13. Kalven and Ziesel report 21 death sentences out of a sample of 111 murder cases tried in the years 1954, 1955 and 1958 in which a jury returned a verdict of guilty of a capital degree of the offense, and the presiding judge agreed with their guilty verdict. KALVEN & ZEISEL, THE AMERICAN JURY (1966) 435-436.

B. Rape

1. In the federal courts, rape is capitally punishable under 18 U.S.C. §2031 (1964). For all federal district courts (excluding the District of Columbia, Canal Zone, Guam and the Virgin Islands), there appear to have been a total of 185 rape convictions between July 1, 1961 and June 30, 1969, excluding the fiscal year 1964-1965, for which no figure is reported. For the calendar years 1961 through 1969, no death sentences were imposed for rape by a federal court. Conviction figures are taken from table D5 in the Annual Reports of the Director of the Administrative Office of the United States Courts for the years 1962-1969; death-sentence figures from NPS (1961) through NPS (1968).[5f]

2. There appear to have been 185 commitments under conviction for capital rape offenses in Florida between July 1, 1964 and June 30, 1968. During the five calendar years encompassing these four fiscal years, 8 men were sentenced to die for rape. FLORIDA DIVISION OF CORRECTIONS, FIFTH BIENNIAL REPORT (July 1, 1964-June 30, 1966) (1966) 74-75; *id.*, SIXTH BIENNIAL REPORT (July 1, 1966 to June 30, 1968) (1968) 77; NPS (1964); *id.* (1965);

[5f]No death sentences were imposed for rape during the last six months of 1969 that are uncovered by the published figures. See note 3f *supra*.

id. (1966); *id.* (1967); *id.* (1968). During the two year period between July 1, 1968 and June 30, 1970, there appear to have been 148 commitments under conviction for capital rape offenses. FLORIDA DIVISION OF CORRECTIONS, SEVENTH BIENNIAL REPORT (July 1, 1968 to June 30, 1970) (1970) 83. No more than 6 death sentences were imposed.[6f]

3. There appear to have been 299 commitments under conviction for rape in Georgia between July 1, 1964 and December 31, 1968. During the five calendar years encompassing these four and a half fiscal years, 8 men were sentenced to die for rape. STATE OF GEORGIA BOARD OF CORRECTIONS, ANNUAL REPORT (July 1, 1964-June 30, 1965) (1965) 56; *id.* (July 1, 1965-June 30, 1966) (1966) 52; *id.* (July 1, 1966-June 30, 1967) (1967) 39; *id.* (July 1, 1967-June 30, 1968) (1968) 45; *id.* (July 1, 1968-June 30, 1969) (1969) 101; NPS (1964); *id.* (1965); *id.* (1966); *id.* (1967); *id.* (1968).

4. There appear to have been 190 commitments under conviction for rape and assault with intent to rape in Maryland between July 1, 1964 and June 30, 1966. During the three calendar years encompassing those two fiscal years, 3 men were sentenced to die for rape offenses. MARYLAND DEPARTMENT OF CORRECTION, THIRTY-NINTH REPORT (July 1, 1964-June 30, 1965) (1965) 30; *id.*, FORTIETH REPORT (July 1, 1965-June 30, 1966) (1966) 36; NPS (1964); *id.* (1965); *id.* (1966). There appear to have been 102 commitments for rape offenses for the fiscal year July 1, 1967 through June 30, 1968, with no death sentences. MARYLAND DEPARTMENT OF CORRECTIONAL SERVICES, FORTY-SECOND REPORT (July 1, 1967-June 30, 1969) (1969), unpaginated; NPS (1967); *id.* (1968).

[6f]A total of 19 commitments under sentence of death are reported in Florida for the fiscal years 1968-1970. *Id.* at 81. Since 13 of these were for murder (see p. 5f *supra*) no more than 6 could have been for rape.

(During all these years, rape and assault with intent to rape were capital in Maryland.)

5. Johnson reports that in North Carolina, between July 1, 1938 and December 31, 1953, there were 382 convictions for rape, as compared with 52 death sentences (admissions to death row) upon conviction for rape. The conviction figure seems unduly low, even considering the availability to the jury of verdicts for lesser offenses. Johnson, *Selective Factors in Capital Punishment,* 36 SOCIAL FORCES 165, 166 (1957).

6. It appears that there were 63 commitments under conviction for rape in Tennessee during fiscal years July 1, 1965-June 30, 1968. During the four calendar years encompassing these three fiscal years there were 7 men sentenced to die for rape. TENNESSEE DEPARTMENT OF CORRECTION, DEPARTMENTAL REPORT (1965-1966, 1966-1967) (1968), pages unnumbered; *id.*, (PERIOD ENDING JUNE 30, 1969) (1969), pages unnumbered; NPS (1965); *id.* (1966); *id.* (1967); *id.* (1968).

7. Partington appears to say that, between 1908 and 1963, there were 2798 offenders committed to the Virginia State Penitentiary upon convictions for the capital crimes of rape, attempted rape, statutory rape, and attempted statutory rape. There were 68 death sentences in this group, including two imposed upon defendants who had been convicted of capital robbery as well as the sexual offense. For rape alone, there were 1595 commitments, including 41 death sentences. The principal problem with these figures appears to be that the commitment figures are doubtless considerably lower than the number of capital convictions, since some capital offenders would have received jail terms, probation, or suspended sentences. Partington, *The Incidence of the Death Penalty for Rape in Virginia,* 22 WASH. & LEE L. REV. 43, 43-44, 71-73 (1965).

In addition to the figures available for comparison, *supra,* national totals of commitments under sentence of death are reported. These alone give some sense of the extreme infre-

quency with which persons convicted of capital crimes are actually sentenced to death. During the period covered by the following figures, thirty-nine American States, the District of Columbia, and the federal jurisdiction maintained statutes of general applicability punishing one or more offenses with death. In some States, half a dozen or more crimes were so punishable.[71] Yet the following numbers of men were received under sentence of death in all of the prisons of the United States in the following years (NPS (1968), p. 12, table 4):

1961 - 140
1962 - 103
1963 - 93
1964 - 106
1965 - 86
1966 - 118
1967 - 85
1968 - 102

[71]The capital statutes now in force in the United States are set forth in Appendix G to this brief, *infra*. Some of those in force during the period 1961-1968 have, however, since been repealed.

APPENDIX G

PROVISIONS OF THE CRIMINAL STATUTES OF THE UNITED STATES AND OF THE FIFTY STATES PROVIDING FOR THE PUNISHMENT OF DEATH*

United States

Uniform Code of Military Justice (10 U.S.C., subtit. A, ch. 47):

§ 885 (desertion)
§ 890 (assaulting or willfully disobeying a superior commissioned officer)
§ 894 (mutiny or sedition)
§ 899 (misbehavior before the enemy)
§ 901 (improper use of countersign)
§ 904 (aiding the enemy)
§ 906 (spies)
§ 913 (misbehavior of sentinel)
§ 918 (murder)
§ 920 (rape)

Crimes (18 U.S.C., pt. I):

§ 34 (destruction of aircraft or motor vehicle carrier facilities, resulting in death)
§ 794 (gathering or delivering defense information to aid a foreign government)
§ 844(d), (f), (i) (84 Stat. 957-958) (certain explosives offenses resulting in death)
§ 1111 (murder)
§ 1114 (murder of officers and employees of the United States)
§ 1201 (kidnapping if victim is not released unharmed)
§ 1716 (mailing injurious article, causing death)
§ 1751 (presidential and vice-presidential assassination)
§ 1992 (wrecking train, resulting in death)
§ 2031 (rape)

*Some of these provisions are unconstitutional and inoperative under *United States v. Jackson*, 390 U.S. 570 (1968).

§2113(e) (bank robbery accompanied by death or kidnapping)
§2381 (treason)

Federal Aviation Program (49 U.S.C., ch. 20):

§1472(i), (k)(1) (aircraft piracy, including attempts; rape or murder aboard aircraft)

District of Columbia

D.C. Code (1967):

§22-2401 (murder)

Alabama

Code of Ala., (Recomp. Vol. 1958):

§14-7 (kidnapping for ransom)
§14-8 (attempted kidnapping for ransom)
§14-23 (first degree arson with loss of life or maiming)
§14-24 (second degree arson with loss of life or maiming)
§14-39 (assault on prison guard or any murder by life term prisoner)
§14-85 (burglary)
§14-97(5) (sabotage)
§14-123 (dynamiting under or near inhabited area)
§14-315 (killing in duel)
§14-316 (killing with concealed weapon)
§§14-318,-319 (murder)
§14-355 (lynching)
§14-395 (rape)
§§14-397,-398 (carnal knowledge)
§14-415 (robbery)
§14-416 (train robbery)
§14-424 (treason)

Arizona

Ariz. Rev. Stat. (1956):

§13-250 (armed assault by life term prisoner)
§13-453 (murder)
§13-492 (kidnapping for ransom if victim is harmed)
§13-572 (perjury in capital case resulting in death of innocent person)
§13-644 (train robbery)
§13-701 (treason)

Arkansas

Ark. Stat. Ann. (1947):

§41-502 (arson of prison by convict)
§41-2211 (aiding suicide)
§41-2212 (deadly arson)
§41-2213 (killing in duel)
§41-2214 (captain of boat causing death by deliberately ramming into craft)
§41-2215 (unnecessary killing while resisting felony)
§41-2216 (police officer causing death by exceeding bounds of moderation)
§41-2227 (murder)
§41-2304 (kidnapping for ransom or if victim is harmed)
§41-3403 (rape)
§41-3405 (carnal knowledge of woman intentionally drugged)
§41-3411 (forcing woman to marry)
§41-4102 (treason)

California

Cal. Penal Code (West, 1954):

§37 (treason)
§128 (perjury in capital case resulting in death of innocent person)
§190 (murder)
§209 (kidnapping for ransom or robbery if victim is harmed)

§219 (train wrecking)
§4500 (assault with a deadly weapon or means likely to cause great bodily injury, by a prisoner under sentence of life imprisonment)
§12310 (explosive device causing great bodily injury)

Cal. Mil. & Vet. Code (West, 1955):

§1670, 1672(a) (sabotage causing death or great bodily injury)

Colorado

Colo. Rev. Stat. (1963):

§40-2-3 (murder)
§40-2-45 (kidnapping if victim suffers bodily ha
§40-2-51 (causing death of woman by abortion)
§40-2-52 (causing death of woman during pre tended abortion)
§40-7-3 (perjury in capital case resulting in de of innocent person)
§40-7-49 (armed assault by escaped life prisoner
§40-23-14 (causing death during commission of criminal anarchy)

Connecticut

Conn. Gen. Stat. Ann. (1967):

§53-10 (murder; causing death by arson, bombin or train wrecking)

Delaware

Del. Code Ann. (1970 Cum. pocket part):

tit. 11, §§107, 571 (murder)

Florida

Fla. Stat. Ann. (1965):

§779.07 (sabotage)
§782.04 (murder)
§782.05 (killing in duel)
§782.06 (causing death by train wrecking)
§790.16 (throwing bombs or firing machine-gun in public)
§790.161 (throwing bombs damaging property where death results)
§794.01 (rape; carnal knowledge if victim is under ten)
§805.02 (kidnapping for ransom)

Georgia

Ga. Crim. Code (1969):

§26-1101(c) (murder)
§26-1311 (kidnapping for ransom)
§26-1902 (armed robbery)
§26-2001 (rape)
§26-2201 (treason)
§26-2401 (perjury in a capital case resulting in death)
§26-9921(a) (fetacide)
§26-9922(a) (advising fetacide to a woman)

Idaho

Ida. Code (1947):

§18-4004 (murder)
§18-4504 (kidnapping for ransom if victim is harmed)
§18-5411 (perjury in capital case resulting in death of innocent person)
§18-6007 (causing death by train wrecking)

Illinois

Ill. Ann. Stat. (1961):

c. 38, §9-1 (murder)
c. 38, §10-2 (kidnapping for ransom)
c. 38, §30-1 (treason)

Indiana

Burns Ind. Stat. Ann. (1956):

§10-307 (arson causing death)
§10-3306 (mob lynching causing death)
§10-3401 (murder)
§10-3402 (killing in duel)
§10-3902 (causing death by train wrecking)
§10-4401 (treason)
§10-2903 (kidnapping for ransom)

Kansas

Kan. Stat. Ann. (1970 Cum. Supp.):

§21-3401 (murder)
§21-3421 (kidnapping if victim is harmed)
§21-3801 (treason)
§21-4501(a) (prescribing death penalty for the foregoing crimes)

Kentucky

Ky. Rev. Stat. Ann. (1963):

§433.140 (armed robbery)
§433.150 (asault to rob or with intent to rob)
§433.390 (causing death by train wrecking)
§435.010 (murder)
§435.030 (killing during advocacy of criminal syndicalism)
§435.040 (causing death of woman by abortion)
§435.060 (causing death by obstructing road)
§435.070 (lynching)
§§435.080,-090 (rape)

Massachusetts

Ann. Laws Mass. (1968):
ch. 265, § 2 (murder)

§435.140 (kidnapping for ransom)
§435.190 (reckless shooting into train or motor vehicle)

Louisiana

La. Stat. Ann. (West, 1950):

§14:30 (murder)
§14:42 (aggravated rape)
§14:44 (aggravated kidnapping)
§14:113 (treason)

Maryland

Ann. Code Md. (1957):

§27-12 (assault with intent to rape)
§27-337 (kidnapping)
§27-408 (killing in perpetration of arson)
§27-409 (killing committed in burning of barn, tobacco house, stable or warehouse)
§27-410 (killing while attempting to escape prison or commit rape, sodomy, mayhem or robbery)
§27-413 (murder)
§27-454 (causing death by train wrecking)
§27-461 (rape)
§27-462 (carnal knowledge of child under fourteen)

Mississippi

Miss. Code Ann. (Recomp. vol. 1956):

§2096 (killing in duel)
§2143 (bombing in or near inhabited area)
§2217 (murder)
§2223 (causing death of woman by abortion)
§2238 (kidnapping)
§2358 (rape, including attempts)
§2367 (armed robbery)
§2397 (treason)

Missouri

Vernon's Mo. Stat. Ann. (1953):

§557.020 (perjury in capital case resulting in death of accused)
§559.030 (murder)
§559.230 (kidnapping for ransom)
§559.260 (rape)
§560.135 (armed robbery)
§562.010 (treason)
§564.560 (bombing)

Montana

Rev. Code Mont. (1947):

§94-2505 (murder)
§94-2601 (kidnapping for ransom)
§94-3207 (causing death by train wrecking)
§94-3813 (perjury in capital case resulting in death of innocent person)
§94-4501 (treason)

Nebraska

Neb. Rev. Stat. (1943):

§28-401 (murder)
§28-417 (kidnapping if victim is injured or threatened with injury)

Nevada

Nev. Rev. Stat (1967):

§196.010 (treason)
§199.160 (perjury resulting in death of innocent person)
§200.030 (murder)
§200.363 (rape with substantial bodily harm)
§200.320 (kidnapping for ransom if victim is harmed)
§200.400 (assault with intent to rape accompanied by acts of violence and bodily harm)

§200.410 (killing in duel)
§202.270 (dynamiting where threat to human life)
§212.060 (life prisoner killing any person while attempting to escape)

New Hampshire

N.H. Rev. Stat. Ann. (1955):

§585.4 (murder)

New Jersey

N.J. Stat. Ann. (1952):

§2A: 113-4 (murder)
§2A: 118-1 (kidnapping for ransom)
§2A: 148-1 (treason)
§2A: 148-6 (attempt or conspiracy to assault chief of state)

New Mexico

N.M. Stat. Ann. (1969 Cum. pocket part):

§40A-29-2.1 (murder of police officer or prison guard, or commission of second capital felony after time for due deliberation after the first)

New York

N.Y. Penal Code (McKinney's, 1967):

§125.30 (murder of police officer or by life term prisoner)

North Carolina

N.C. Gen. Stat. (1953):

§14-17 (murder)
§14-20 (killing in duel)

§14-21 (rape)
§14-52 (burglary)
§14-58 (arson)

North Dakota

N.D. Century Code (1960):

§12-07-01 (treason)
§12-27-13 (first degree murder by prisoner serving life sentence for first degree murder)

Ohio

Ohio Rev. Code Ann. (1953):

§2901.01 (murder)
§2901.02 (causing death by train wrecking)
§2901.03 (convict killing guard)
§2901.04 (killing police officer on duty)
§2901.09 (killing President or presidential successor)
§2901.10 (killing Governor or Lieutenant-Governor)
§2901.27 (kidnapping or maiming for extortion, if victim is not released unharmed)
§2901.28 (killing a kidnapped person by designated means)

Oklahoma

Okla. Stat. Ann. (1958):

tit. 21, §707 (murder)
§745 (kidnapping for ransom)
§801 (armed robbery)
§1115 (rape)

Pennsylvania

Purdon's Pa. Stat. Ann. (1962):

tit. 18, §4701 (murder)
§4710.2 (assault with intent to kill by life term prisoner)
§3765 (lynching)
§4919 (causing death by train wrecking)

Rhode Island

R.I. Gen. Laws (1970):

§11-23-2 (murder by life-sentenced prisoner)

South Carolina

S.C. Code Ann. (1962):

§16-52 (murder)
§16-54 (killing by stabbing)
§16-57 (lynching)
§16-63 (killing in duel)
§§16-72,-80 (rape; assault with attempt to rape; carnal knowledge)
§16-91 (kidnapping where victim is not released alive before trial)
§16-92 (conspiracy to kidnap)
§17-553.1 (third conviction for crimes optionally punishable by death)
§§44-353,-354 (giving information or aiding enemy in time of war)

South Dakota

S.D. Comp. Laws (1967):

§22-16-12 (murder)
§22-19-1 (kidnapping if victim is harmed)

Tennessee

Tenn. Code Ann. (1955):

§39-2405 (murder)
§39-2603 (kidnapping for ransom)
§39-2803 (assault with deadly weapon while in disguise)
§39-3702 (rape)
§§39-3703 through 39-3705 (carnal knowledge)
§39-3901 (armed robbery)

Texas

Vernon's Tex. Penal Code Ann. (1961):

§33 (instigation of a minor by a relative or spouse to commit a capital crime)
§84 (treason)
§309 (perjury in capital case resulting in an execution)
§1177(a) (kidnapping for ransom)
§1183 (carnal knowledge)
§1189 (rape)
§1257 (murder)
§1260(a) (lynching)
§1408 (armed robbery)

Utah

Utah Code Ann. (1953):

§76-7-12 (armed assault by life term prisoner)
§76-16-2 (killing in duel)
§76-30-4 (murder)
§76-35-1 (kidnapping for ransom)

Vermont

Vt. Stat. Ann. (1970 Cum. supp.):

tit. 13, §2303 (second first degree murder offense; murder of prison guard or police officer)

Virginia

Va. Ann. Code (Repl. vol. 1960):

§18.1-16 (attempt to commit rape)
§18.1-22 (murder)
§18.1-38 (kidnapping for ransom or immoral purposes)
§18.1-44 (rape and carnal knowledge)
§18.1-75 (arson)
§18.1-86 (burglary)
§18.1-90 (armed bank robbery)
§18.1-91 (aggravated robbery)
§18.1-259 (machine gun used in perpetration of crime of violence)
§18.1-418 (treason)

Washington

Wash. Rev. Code Ann. (1961):

§9.48.030 (causing death by train wrecking)
§9.48.030 (murder)
§9.52.010 (kidnapping for ransom)
§9.82.010 (treason)

Wyoming

Wyo. Stat. Ann. (1957):

§6-54 (murder)
§6-56 (killing in duel)
§6-59 (kidnapping for ransom or robbery if victim is harmed)
§6-61 (child stealing)
§37-248 (causing death by train wrecking or boarding train with intent to commit a felony)

APPENDIX H

THE EVIDENCE CONCERNING THE DETERRENT EFFICACY OF THE DEATH PENALTY

This appendix describes the findings of the numerous udies conducted during recent decades concerning the terrent efficacy of capital punishment. Part A sets forth e conclusions of social scientists who have tested statisally the hypothesis that capital punishment is superior to prisonment as a deterrent of the crime of murder. Part evaluates the anecdotal impressions of law enforcement ficers on the same subject.

A. The Statistical Evidence

It is no exaggeration to report that scientific studies of e deterrent effect of capital punishment speak with rare d compelling unanimity. Recent studies are presaged by e conclusions of George B. Vold in 1932 that "the death nalty does not, and can not, prevent crime, either specifily in regard to murder or more generally in regard to ner kinds of crime,"[1h] and of Robert H. Dann in 1935 at "the homicide rate can never be materially affected, e way or the other, by the present program of executns . . . ."[2h]

A number of post-War studies were based on the data llected during the intensive efforts of the British Royal mmission on Capital Punishment, between 1949 and 53.[3h] That data led all informed students of the subject conclude: "[I]t is not true to say that capital punish-

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[1h]Vold, *Can the Death Penalty Prevent Crime?*, 12 PRISON URNAL (No. 4) 4, 9 (1932).

[2h]Dann, *The Deterrent Effect of Capital Punishment*, FRIENDS IAL SERVICE SERIES, Bulletin No. 29 (Third Month) 19 (1935).

[3h]See ROYAL COMMISSION ON CAPITAL PUNISHMENT 1949-, REPORT (H.M.S.O. 1953) Cmd. 8932 [hereafter cited as YAL COMMISSION].

ment is in practice a greater deterrent than other forms of severe punishment."[4h] The conclusion of the Commission itself, confined as it was by its limited terms of reference, was: "It is . . . important . . . not to base a penal policy in relation to murder on exaggerated estimates of the uniquely deterrent force of the death penalty."[5h] And the Commission carefully noted that "it is impossible to arrive confidently at any firm conclusion about the deterrent effect of the death penalty, or indeed of any form of punishment."[6h] But this caution and its technically delimited conclusion does not obscure the Commission's assessment of the statistical evidence before it:

> ". . . We agree with Professor Sellin that the only conclusion which can be drawn from the figures is that there is no clear evidence of any influence of the death penalty on the homicide rates of these States [principally neighboring abolitionist and retentionist jurisdictions of the United States, systematically studied by Sellin] and that, 'whether the death penalty is used or not and whether executions are frequent or not, both death-penalty States and abolition States show rates which suggest that these rates are conditioned by other factors than the death penalty.'"
>
> ". . . The general conclusion which we have reached is that there is no clear evidence in any of the figures we have examined that the abolition of capital punishment has led to an increase in the homicide rate, or that its reintroduction has led to a fall."[7h]

[4h] GARDINER, CAPITAL PUNISHMENT AS A DETERRENT: AND THE ALTERNATIVE (1956), 31. *Accord:* GOWERS, A LIFE FOR A LIFE (1956), 138; Hart, *Murder and the Principles of Punishment: England and the United States,* 52 NW. U. L. REV. 433, 458 (1957). See also KOESTLER, REFLECTIONS ON HANGING (Amer. ed. 1957), 59.

[5h] ROYAL COMMISSION 24.

[6h] *Ibid.*

[7h] *Id.*, at 23.

The conclusion of the more recent study made under the auspices of the European Committee on Crime Problems of the Council of Europe is in full accord with the Royal Commission's findings. "Even a cursory examination of the statistics on the subject for [Council of Europe] countries shows that they give no positive indication regarding the value of capital punishment as a deterrent."[8h]

Contemporary criminologists who have studied deterrence and the death penalty in the United States speak with one voice in summarizing their conclusions from the evidence:

> Capital punishment has had no appreciable influence on the murder rate in the states which have been investigated.[9h]
>
> Capital punishment does not act as an effective deterrent to murder.[10h]
>
> Capital punishment is ineffective in deterring murder.[11h]
>
> The use or non-use of capital punishment has no effect on the number of murders committed within a state or the nation.[12h]
>
> The evidence indicates that [the death penalty for murder] has no discernible effects in the United States.[13h]

[8h] ANCEL, THE DEATH PENALTY IN EUROPEAN COUNTRIES (Council of Europe, European Committee on Crime Problems, 1962), 45-46.

[9h] Andenaes, *Does Punishment Deter Crime?* 11 CRIMINAL LAW QUARTERLY 76, 83 (1968).

[10h] Chambliss, *Types of Deviance and the Effectiveness of Legal Sanctions,* [1967] WISCONSIN L. REV. 703, 706 (1967).

[11h] Doleschal, *The Deterrent Effect of Legal Punishment: A Review of Literature,* 1 INFORMATION REVIEW ON CRIME & DELINQUENCY (No. 7) 7 (1969).

[12h] LUNDEN, THE DEATH PENALTY (1960), § 22.

[13h] Reckless, *The Use of the Death Penalty–A Factual Statement,* 15 CRIME & DELINQUENCY 43, 52 (1969).

> Statistical findings and case studies converge to disprove the claim that the death penalty has any special deterrent value.[14h]
>
> The death penalty, as we use it, exercises no influence on the extent or fluctuating rates of capital crimes.[15h]
>
> The studies [of capital punishment] suggest no discernible relationship between the presence of the death penalty and homicide rates.[16h]
>
> The capital punishment controversy has produced the most reliable information on the general deterrent effect of a criminal sanction. It now seems established and accepted that . . . the death penalty makes no difference to the homicide rate.[17h]

These general conclusions rest upon the following results of statistical inquiries into specific aspects of the deterrence question:

> Death penalty jurisdictions do not have a lower rate of criminal homicide than abolition jurisdictions.[18h]
>
> Given two states otherwise similar in factors that might affect homicide rates, and differing in that one employs capital punishment while the other

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[14h] Schuessler, *The Deterrent Influence of the Death Penalty*, 284 ANNALS 54, 62 (1952).

[15h] SELLIN, THE DEATH PENALTY (1959), published as an appendix to AMERICAN LAW INSTITUTE, MODEL PENAL CODE, Tent. Draft No. 9 (May 8, 1959) [hereafter cited as SELLIN (1959)], 63.

[16h] ZIMRING, PERSPECTIVES ON DETERRENCE (Nat'l Institute of Mental Health, January 1971), 17.

[17h] Morris and Zimring, *Deterrence and Corrections*, 381 ANNALS 137, 143 (1969).

[18h] Schuessler, *supra* note 14h, at 57; Reckless, *supra* note 13h at Table 9.

does not, the abolition state does not show any consistently higher rate of criminal homicide.[19h]

In jurisdictions which abolish the death penalty, abolition has no influence on the rate of criminal homicide.[20h]

Jurisdictions which reintroduce the death penalty after having abolished it do not show a decreased rate of criminal homicide after reintroduction.[21h]

Police officers on duty do not suffer a higher rate of criminal assault and homicide in abolition jurisdictions than in death penalty jurisdictions.[22h]

Prisoners and prison personnel do not suffer a higher rate of criminal assault and homicide from life-term prisoners in abolition jurisdictions than in death penalty jurisdictions.[23h]

[19h] SELLIN (1959) 23-34; SELLIN, CAPITAL PUNISHMENT (1967) [hereafter cited as SELLIN (1967)], 135-138.

[20h] SELLIN (1959) 34-38; SELLIN (1967) 122-124; Samuelson, *Why Was Capital Punishment Restored in Delaware*, 60 J. CRIM. L., CRIM. & POL. SCI. 148, 150-151 (1969).

[21h] SELLIN (1959) 34-38; SELLIN (1967) 122-124; Samuelson, note 20h *supra*, at 150-151.

[22h] Sellin, *Does the Death Penalty Protect Municipal Police*, in BEDAU, THE DEATH PENALTY IN AMERICA (Rev. ed. 1967) [hereafter cited as BEDAU], 284-301; Campion, *Does the Death Penalty Protect the State Police*, in BEDAU 301-315.

[23h] MASSACHUSETTS SPECIAL COMMISSION ESTABLISHED FOR THE PURPOSE OF INVESTIGATING AND STUDYING THE ABOLITION OF THE DEATH PENALTY IN CAPITAL CASES, REPORT AND RECOMMENDATIONS, 21-22 (1958); SELLIN (1967) 154-160; Sellin, *Homicides and Assaults in American Prisons*, 1964, 31 ACTA CRIMINOLOGIAE ET MEDICINAE LEGALIS JAPONICA 139 (1965).

B. Impressions of Law Enforcement Officers

Law enforcement officers frequently dismiss the statistical evidence set forth above because they say that it fails to prove that the threat of capital punishment never deterred a murder which would have occurred if imprisonment had been the only risk run by the murderer.[24h] Police spokesmen invariably base their own belief in the deterrent efficacy of the death penalty entirely upon impressionistic bases,[25h] and upon the quoted statements of criminals (made to police officers following their arrests) claiming that they carried toy guns in robberies out of fear of the death penalty.[26h] It would be improper, certainly, to reject the intuitions of the police out of hand, or to assert categorically that the fear of death never has dissuaded any putative murderer from his crime. However, several circumstances render these police opinions gravely suspect as a foundation for the present-day American use of death as a penalty for first-degree murder.

First, correctional officials, whose knowledge of criminal offenders is at least as informed as that of the police, generally do not believe that the death penalty is a superior deterrent to imprisonment.[27h] They and other knowledgeable observers agree that a very large proportion of the crimes which are defined by law as first-degree murders and

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[24h] E.g., Hoover, *Statements in Favor of the Death Penalty*, in BEDAU 130; Allen, *Capital Punishment: Your Protection and Mine*, in BEDAU 135.

[25h] See ROYAL COMMISSION 18-24; CANADA, JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS ON CAPITAL AND CORPORAL PUNISHMENT AND LOTTERIES, REPORT (1956), paras. 29-33, 43-50; NEW JERSEY, COMMISSION TO STUDY CAPITAL PUNISHMENT, REPORT (1964) 8-9.

[26h] E.g., Desky, *Should Capital Punishment be Abolished in California*, 39 THE COMMONWEALTH 19, 23 (November 11, 1963).

[27h] See note 116, para. (4) to the body of this brief.

made punishable by death are not the product of rational choice which the threat of the extreme penalty can deter.[28h] Second, when a murder *is* the product of rational choice in the sense that it can be affected by the threat of punishment, the threat of death punishment is so attenuated by its uncertainty as to become minimally significant.[29h] Third, the number of "toy gun" incidents and similar cases in which criminals assert that their behavior was affected by the threat of the death penalty remains uncounted, but (even if the reports are reliable)[30h] these cases must be few, since they register no impact upon any known comparison of homicide rates in abolition and death-penalty jurisdictions or eras. See Part A, *supra*. Of course, it may be that such cases are offset by the equally unknown number of instances of the clinically documented converse phenomenon of "suicide-by-homicide": that is, the cases of killers who kill in order to force society to kill

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[28h] LAWES, LIFE AND DEATH IN SING SING (1928), 144-145; Testimony of Clinton T. Duffy, in *Hearings Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary*, 90th Cong., 2d Sess., on S.1760, To Abolish the Death Penalty (March 20-21 and July 2, 1968) (G.P.O. 1970) [hereafter cited as *Hearings*], 23; DUFFY & HIRSHBERG, 88 MEN AND TWO WOMEN (1962); 256, see WEIHOFEN, THE URGE TO PUNISH (1956); 150-152; PLAYFAIR & SINGTON, THE OFFENDERS (1957), 228; Statement of Attorney General Ramsey Clark, in *Hearings*, at 92; Ancel, *The Problem of the Death Penalty*, in SELLIN (1967), 3, 17, Sellin, *The Inevitable End of Capital Punishment*, in SELLIN (1967), 239, 249-250; McNamara, *Statement Against Capital Punishment*, in BEDAU 182, 185-186; Schuessler, *The Deterrent Influence of the Death Penalty*, 284 ANNALS 54, 61-62 (1952); Caldwell, *Why Is The Death Penalty Retained?* 284 ANNALS 45, 51 (1952)

[29h] See WEIHOFEN, THE URGE TO PUNISH (1956), 159-164; BEDAU 270.

[30h] They seem unlikely to be very reliable, since an arrested man will understandably tell a policeman what he thinks the policeman wants to hear. See Testimony of Clinton T. Duffy, in *Hearings*, at 23.

them in return.[31h] In any event, one thing seems plain. The police impressions and anecdotes do not point to any factor, unaccounted for by the statistical studies, which would explain why the studies consistently fail to reflect appreciable deterrent effects of the death penalty if they exist.

[31h] West, *Medicine and Capital Punishment*, in *Hearings*, at 124, 126-127; SELLIN (1959) 65-69; BEDAU 264 n.7; Gold, *Suicide, Homicide, and the Socialization of Aggression*, 63 AM. J. SOCIOLOGY 651 (1958); Neiberg, *Murder and Suicide*, 4 ARCH. CRIM. PSYCHODYNAMICS 253 (1961); OHIO LEGISLATIVE SERVICE COMMISSION, STAFF RESEARCH REPORT No. 46, CAPITAL PUNISHMENT (1961), 49.

APPENDIX I

DESCRIPTION OF AMERICAN METHODS OF EXECUTION

Lethal Gas

720. The lethal chamber is very elaborate in comparison with the apparatus needed for other methods of execution. It is expensive to install and requires a complicated series of operations to produce the gas and to dispose of it afterwards. The technique appears to be substantially the same in all the States that employ the gas chamber, although the complexity of the apparatus varies from State to State. The following description of the method and equipment employed in North Carolina[1] is typical.

"A chamber or room, when the doors are closed, is hermetically sealed to prevent leakage of cyanide gas. This room contains two observation windows. One window is for observation by the required witnesses and the other for officials required to be present at the execution. The doors leading to the chamber are connected with the electrically controlled panel. This is the safety measure, and unless the doors are properly closed the trap, allowing the cyanide pellets to drop into the acid, cannot be thrown. In this room is a wooden chair with leather straps for strapping the prisoner's arms, legs and across the abdomen to the chair. In the seat of this chair is a trap door electrically controlled which releases the cyanide pellets.

"Prior to the execution all equipment is double checked and a pound of sodium cyanide pellets is placed in the trap in the seat of the chair. Twenty minutes before execution three pints of U.S.P. sulphuric acid and six pints of water are carefully mixed in a lead container. The container is covered with a lid of similar material and is placed under the chair in a position to receive the pellets when dropped.

"There are two copper pipes adjacent to the chair which lead under the floor outside the physician's stand. At the end of the pipe in the chamber is a rubber hose which is to be connected to the head of a Bowles stethoscope strapped to the prisoner's chest. Attached to the other end of the copper pipes at the physician's stand are the earpieces of a stethoscope for determining the time of the prisoner's death.

"The prisoner has been previously prepared in his cell in this manner; clothing removed, with the exception of shorts; the head of a Bowles stethoscope strapped over the apex of the heart with broad strips of adhesive.

"After the above preparations the prisoner walks to the execution chamber preceded by the Chaplain and followed by the Warden or one of his Deputies. He is then strapped in the chair under the supervision of the Warden or Deputy; a leather mask applied to the face; the stethoscope head connected with aforementioned tube; the Chaplain's prayers completed and

all officials leave the chamber. The last person leaving the chamber quickly removes the cover from the acid container. The doors to the chamber and ante-room are quickly closed and the pellets dropped in the acid by the electrically controlled switch.

"After the prisoner is pronounced dead by the attending physician ammonia gas is forced into the chamber until indicators within the chamber show that all cyanide gas has been neutralised. Ammonia gas is then removed by a specially constructed exhaust fan."

721. The length of time taken by this method of execution is illustrated by the following timetable of an execution in Nevada:[3]

Guards enter prisoner's cell	5.56 a.m.
Prisoner enters gas chamber	5.58
Strapped in chair	5.59: 30
Door closed	6.01: 30
Gas strikes face	6.02: 30
Apparently unconscious	6.02: 35
Certainly unconscious	6.03
Respiration stopped	6.03
Heart stopped beating	6.04
Suction fan started	6.10
Body removed	6.40

722. When this method was first employed, medical opinion was not unanimous about it; there were some who thought that the gas had a suffocating effect which would cause acute distress, if not actual pain, before the prisoner became unconscious. It seems to be now generally agreed that unconsciousness ensues very rapidly.

ROYAL COMMISSION ON CAPITAL PUNISHMENT 1949-1953, REPORT (H.M.S.O. 1953) [Cmd. 8932] [hereafter cited as ROYAL COMMISSION], 252-253.

On the morning of an execution the executioner got two pounds of cyanide from the prison armory and took it to a mix room off the gas chamber. Regardless of whether there was to be one execution or two, he carefully measured out into little gauze bags one pound of cyanide for each chair. These bags were placed on hooks directly under the chairs, hanging down toward the wells a few inches below.

About ten minutes before the prisoner was to be brought in, the executioner put a gallon of distilled water into each of two jars, then added sulphuric acid, letting it stand in the mix room until it was time for the actual execution. Tubes ran from these jars into the wells beneath the chairs. After the chamber was tested for leaks, the prisoner, with a stethoscope strapped to his chest, was taken from the holding cell. When he was seated in one of the chairs, his hands and feet were strapped and the stethoscope was hitched to a tube connected with a valve outside the chamber, where the attending physician could listen to the man's heart beats and report the time of death.

When the door was sealed with the prisoner inside, the executioner pulled a lever controlling a suction fan that drew some of the air out of the chamber. He then signaled an assistant in the mix room, who opened the valves releasing the sulphuric acid from the jars into the wells beneath the chairs. After the valves were closed, the executioner informed the warden, standing beside him outside a window to the left of the condemned man, that everything was in readiness. At the warden's nod, the executioner pulled another lever which lowered the cyanide into the sulphuric acid, causing gas fumes to rise. The whole operation took less than two minutes.

In order to make death as quick and painless as possible, the condemned man was instructed to take deep breaths at the warden's signal. This would be a few seconds after the cyanide and sulphuric acid came together. Without the inhalations, loss of consciousness would take longer and choking might result.

DUFFY & HIRSHBERG, 88 MEN & 2 WOMEN (1962), 102-103.

In administering death by lethal gas, which has been most
experience, and hanging, from 89 personal experiences, I ma
following observations:

With the exception of the death watch (which is used in all met
there are no last hours of preparation of the body of the conde
The prisoner is kept in a holding cell in a separate room for hi
few days—usually not more than 20 feet from the lethal gas cha
He does not see the gas chamber until he enters it. A few mo
before the scheduled hour a chaplain of his choice visits with hi
is dressed in blue jeans and a white shirt. The reason for that
other garments that might hold or pocket gas when the body
moved. He is accompanied the 10 or 12 steps by two officers, q
strapped in the metal chair, the stethoscope applied, and the
sealed. The warden gives the executioner the signal and, out of
of the witnesses, the executioner presses the lever that allow
cyanide gas eggs to mix with the distilled water and sulphuric
In a matter of seconds the prisoner is unconscious. At first there
treme evidence of horror, pain, strangling. The eyes pop, they
purple, they drool. It is a horrible sight. Witnesses faint. It
is as though he has gone to sleep. The body, however, is not disf
or mutilated in any way.

TESTIMONY OF CLINTON T. DUFFY, in *Hearings Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary*, 90th Cong., 2d Sess., on S. 1760, To Abolish the Death Penalty (March 20-21 and July 2, 1968) (G.P.O. 1970) [hereafter cited as *Hearings*], 21.

The next morning, a Friday, I went into the Holdi
Cell area about eight-thirty. The guard said Leanderess h
slept for only fifteen minutes, around six o'clock. I offer
to read from the Bible; he appeared to listen. I read fro
the Psalms, and parts of two hymns: "Rock of Ages" a
"Abide with Me." Leanderess held up his hands, palms o
in a gesture for me to stop. He had not paid any noticeab

attention at any time, had continued pacing around his tiny cell.

He still had about an hour to live. I sat down outside his cell door. The guards talked about retirement, and whether the golf course would be too wet the next morning. At nine-fifty, Associate Warden Rigg and the doctors came in. I told Leanderess to say a prayer to himself, if he did not care to have me pray, and to relax into God's care. He did not seem to hear me. When the doctors started to approach his cell, he made a throaty, gutteral growling sound. Frantically, at random, he picked up some of the old legal papers on his table and began passing them through the bars to the associate warden, as if they were appeals or writs.

A guard unlocked his cell. He gripped the bars with both hands and began a long, shrieking cry. It was a bone chilling wordless cry. The guards grabbed him, wrested him violently away from the bars. The old shirt and trousers were stripped off. His flailing arms and legs were forced into the new white shirt and fresh blue denims. The guards needed all their strength to hold him while the doctor taped the end of the stethoscope in place.

The deep-throated cry, alternately moaning and shrieking, continued. Leanderess had to be carried to the gas chamber, fighting, writhing all the way. As the witnesses watched in horror, the guards stuffed him into a chair. One guard threw his weight against the struggling little Negro while the other jerked the straps tight. They backed out, slammed the door on him.

Leanderess didn't stop screaming or struggling. Associate Warden Rigg was about to signal for the dropping of the gas pellets when we all saw Riley's small hands break free from the straps. He pulled at the other buckles, was about to free himself.

The Associate Warden withheld his signal. San Quentin had never executed a man ranging wildly around the gas chamber. He ordered the guards to go in again and restrap

the frenzied man. One of the guards said later he had to cinch the straps down so tightly the second time that he "was ashamed of himself."

Again the door was closed. Again Leanderess managed to free his small, thin-wristed right hand from the straps. Riggs gave the order to drop the pellets. Working furiously, Leanderess freed his left hand. The chest strap came off next. Still shrieking and moaning, he was working on the waist strap when the gas hit him. He put both hands over his face to hold it away. Then his hands fell, his head arched back. His eyes remained open. His heart beat continued to register for two minutes, but his shrieking stopped and his head slowly drooped.

ESHELMAN, DEATH ROW CHAPLAIN (1962), 160-161.

Electrocution

717. During our visit to America we inspected the electric chairs at Sing Sing Prison, New York, and the District of Columbia Jail, Washington, and we received evidence about the use of the chair in other States. The following account of this method of execution is based primarily on the information obtained in Washington, where the procedure is as follows.

The execution takes place at 10 a.m. At midnight on the preceding night the condemned man is taken from the condemned cell block to a cell adjoining the electrocution chamber. About 5.30 a.m. the top of his head and the calf of one leg are shaved to afford direct contact with the electrodes. (The prisoner is usually handcuffed during this operation to prevent him from seizing the razor.) At 7.15 a.m. the death warrant is read to him and about 10 o'clock he is taken to the electrocution chamber. Five witnesses are present (including representatives of the Press) and two doctors—the prison medical officer and the city coroner. The witnesses watch the execution through a grille or dark glass and cannot be seen by the prisoner.[9] Three officers strap the condemned man to the chair, tying him around the waist, legs and wrists. A mask is placed over his face and the electrodes are attached to his head and legs. As soon as the operation is completed (about two minutes after he has left the cell) the signal is given and the switch is pulled by the electrician; the current is left on for two minutes, during which there is alternation of two or more different voltages. When it is switched off, the body slumps forward in the chair. The prisoner does not make any sound when the current is

l on, and unconsciousness is apparently instantaneous. He is not, er, pronounced dead for some minutes after the current is disconnected. eg is sometimes slightly burned, but the body is not otherwise marked utilated. So far as is known no special difficulties arise in the ion of women: there had been no case in Washington.

. In Washington the electric chair is a permanent fixture in a special- er. In some States movable chairs are used which can be installed by mpetent electrician. No case of mishap was recorded in Washington, seems that in some other States there have been occasions when rrent failed to reach the chair when the switch was engaged. Some install an emergency generator in order that an execution may not layed by a failure of the commercial power.

ROYAL COMMISSION 251.

The technique now used in execution by electricity has been gradually evolved by leading electrical and medical experts working in collaboration with the prison authorities. It has been found by exhaustive research that a current of one ampere passing through the brain or other vital organ of the body will in most cases produce death if allowed to act for only a short period of time, and it is therefore evident that it is the amperage (or quantity of electrical current flowing in the circuit) together with the energy dissipated in the body which actually destroys life. On the other hand, the element of voltage enters, insomuch as the resisting power of the human body is very high and it requires a voltage comparatively large or small, depending entirely upon the resistance and contacts, to force this amount of current through a circuit in which the body, with its contacts, constitutes the resistance.

The condemned prisoner undergoing electrocution at Sing Sing Prison is given one shock of single phase 60

cycle alternating current at an average starting potential of approximately 2,000 volts. This voltage is immediately reduced at the end of three seconds to the neighbourhood of 500 volts where it is held for an additional period of 57 seconds and is again built up instantly to the original starting voltage of 2,000. The current is then gradually reduced again to 500 volts, where it is held for another 57 seconds and is again rapidly built up to the original voltage of 2,000 just before the switch is finally opened by the executioner after a total application period of two minutes.

This initial electromotive force, with the moistened contacts used, sends a starting current of from 8 to 10 amperes through the human body, which causes instantaneous death and unconsciousness by its paralysis and destruction to the brain. The current is then cut down under the lower voltages to from 3 to 4 amperes in order to avoid burning the body and at the same time to hold paralysis of the heart, respiratory organs, and brain at a standstill for the remaining period of execution. This insures complete destruction of all life.

If temperatures are taken during and immediately after an application of electricity it will be found that the electrodes making contact may reach a temperature high enough to melt copper (1,940 degrees Fahrenheit) and that the average body temperature will be in the neighbourhood of 140 degrees Fahrenheit, which, if this temperature rise alone were considered, would show that it is impossible to restore life or reinstigate blood circulation under such abnormally high bodily temperatures.

It will also be found that under such an application of electricity the temperature in the brain itself approaches the boiling point of water, namely 212 degrees Fahrenheit.

The force of the death-dealing blow the condemned prisoner receives is more easily understood when it is realized that this amount of electricity, transferred into mechanical power, would be equivalent to 884,400 foot-pounds per minute, or enough electrical energy to light 800 lights in the average home.

Under correct application approximately one third of the total electrical energy shot into the human body is dissipated in the brain, and scientific analysis proves that unconsciousness takes place in less than a 240th part of a second, which is far more rapid than the speed with which the nervous system of the human body can record the sensation of pain. This insures a death that is both instantaneous and painless.

LAWES, LIFE AND DEATH IN SING SING (1928), 187-189.

Although I have seen several electric chairs, I have never witssed an electrocution. Wardens and other noted penologists have ld me that it is about as gruesome a procedure as hanging. The body s to be prepared beforehand for the fastening, and one of the pants gs split in order that an electric plate can be placed against the leg. hen the executioner throws the switch that sends the electric curnt through the body, the prisoner cringes from torture, his flesh swells d his skin stretches to a point of breaking. He defecates, he urinates, s tongue swells and his eyes pop out. In some cases I have been d the eyeballs rest on the cheeks of the condemned. His flesh is rned and smells of cooked meat. When the autopsy is performed the er is so hot that doctors have said that it cannot be touched by the man hand.

stimony of Clinton T. Duffy, in *Hearings*, at 20.